

HOCKLY'S
LAW OF
INSOLVENCY
WINDING-UP & BUSINESS RESCUE

TENTH EDITION

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Hockly's Law of Insolvency, Winding-up and Business Rescue

Tenth Edition

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Preface

This tenth edition of *Hockly's Insolvency Law* is the first one written without Professor Robert Sharrock to lead the team of authors, and it is dedicated to him with our admiration and gratitude. Rob was a hard-working scholar, whose experience spanned more than three decades, and with this edition we celebrate his legacy in scholarship and teaching.

In the expanded format of the previous editions, the book's primary purpose remains to provide a concise yet reasonably detailed account of the law of insolvency, winding-up and business rescue proceedings. It aims at a wide readership. For the subject specialist, it offers an update on recent developments in the relevant law; for students, it is a text for both undergraduate and postgraduate study; and for insolvency practitioners, it provides both a clear and practical analysis of the law and material for research and argument. It is also available as an e-book.

The three main subjects of the book have undergone significant developments in terms of case law and legislation. This edition seeks to include the important developments in the ten years since the last one, the most extensive being in business rescue, prompting the revision of the title. Relevant decisions of the Constitutional Court and the Supreme Court of Appeal are mentioned, but the treatment of High Court decisions is inevitably more selective in a niche publication located between a novice's

general overview and an insolvency practitioner's treatise. The book mainly reflects the law of insolvency, winding-up and business rescue by the end of May 2022, with some additions during production.

Of the many new features, only a few can be mentioned here. The introduction in chapter 1 describes South African law insolvency law, with its creditor-friendly basis, as being out of step with international inclinations to grant the debtor a fresh start, and the plight of NINA debtors (having no income and no assets) is sketched. The grip of the guiding principle of the advantage to creditors explains desperate debtors' persistently engineering friendly sequestrations in search of the elusive discharge of their debts. The mantra of the equality of creditors is nuanced and challenging when reconsidered, revealing much about the workings of the distribution of the debtor's assets among the creditors, and about the facets of equality and the choices and circumscriptions of policy. The reform of the Insolvency Act to respond to and improve on South African conditions in 2022 and beyond is explored. Our comments and suggestions are sometimes critical, novel and contentious, and are intended to encourage readers to think creatively for themselves as they travel through the book. Official language choices and modern methods of communications tested in the shadow of COVID-19 are considered in chapter 1 (the latest being NFTs (non-fungible tokens)), including the wisdom of developing a powerful app for the Master of the High Court to carry all appropriate notifications and notices. Chapter 7 on uncompleted contracts has been rearranged, opening with a pigeonholing approach to analysing contracts, followed by a statement of the supporting common law, before discussing a series of specific contracts which are

analysed according to which one of the contractants is now in sequestration or liquidation. Further on, the trustee's payments made by electronic fund transfers (EFTs) are addressed by a directive from the Chief Master. Creditors' liability for contribution is discussed more thoroughly in the light of the recent decision in *FirstRand*. Business rescue now spans three chapters, broadly corresponding to an overview of its purpose, commencement and duration; the general moratorium and the effects of business rescue; and the conduct of business rescue by the business rescue practitioner, the rights of affected persons, meetings and committees, and the business rescue plan. The company's statutory compromise with its creditors has its own chapter. And the last chapter on cross-border insolvency considers the *Cooperativa* case and also the intricacies of enforcing a foreign pre-sequestration statutory composition upon local South African creditors.

As another innovation, references to books and articles appear in a few places. We have tried to make the text even more accessible and have provided extra explanation for readers with limited library access, to make the book a helpful introduction and a handy guide and refresher. Learners with a strong visual sense are shown examples of diagrams and timelines at the end of chapter 12 to help analyse complicated sets of facts and apply complicated provisions to them.

The appendices contain specimen applications and now the forms related to business rescue, together with the Insolvency Act 24 of 1936, excerpts from the Companies Act 61 of 1973, the Companies Act 71 of 2008, the Close Corporations Act 69 of 1984, and the entire Cross-Border Insolvency Act 42 of 2000, with the familiar cross-references in bold brackets to paragraphs in the main text in which the sections appear.

The specimen estate accounts have been omitted from the appendices. Professional associations run courses on insolvency practice featuring their own specimen accounts, and this specialized topic is best learnt by doing worked examples under an experienced practitioner's patient guidance.

A sincere vote of thanks must go to Steve Allcock for his invaluable help and co-operation in publishing this new edition while enduring his own COVID-19 challenge. We also thank Samantha Simmons for managing the project, Linda van de Vijver for editing the text, Daphne Burger for compiling the list of cases, the table of statutes and the subject index and preparing the statutes that appear in the appendices, Drag and Drop for designing the book covers, and CBT Typesetting & Design for the typesetting.

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Contents

Dedication

Preface

Part 1 Introduction

Chapter 1 Introduction

Part 2 Obtaining a sequestration order

Chapter 2 Voluntary surrender

Chapter 3 Compulsory sequestration

Part 3 Effects of sequestration

Chapter 4 The legal position of the insolvent

Chapter 5 Vesting of the assets of the insolvent

Chapter 6 Vesting of the assets of the solvent spouse

Chapter 7 Uncompleted contracts and legal proceedings not yet finalized

Part 4 Collection of estate assets

Chapter 8 Preservation of the estate pending the trustee's appointment

Chapter 9 Meetings of creditors and proof of claims

Chapter 10 The election of the trustee
Chapter 11 The duties and powers of the trustee
Chapter 12 Impeachable dispositions
Chapter 13 Interrogation of the insolvent and other witnesses
Chapter 14 The duties of the insolvent

Part 5
Realization and distribution of the assets

Chapter 15 Realization of the estate assets
Chapter 16 Creditors' claims and their ranking
Chapter 17 The estate accounts and the distribution of the estate

Part 6
Composition and rehabilitation

Chapter 18 Composition
Chapter 19 Rehabilitation

Part 7
Miscellaneous

Chapter 20 Partnership and sequestration
Chapter 21 Insolvent deceased estates
Chapter 22 Offences

Page x

Part 8
Winding-up and rescue of companies and close corporations

Chapter 23 Winding-up of companies
Chapter 24 Winding-up of close corporations

Chapter 25 The commencement of business rescue proceedings

Chapter 26 The effects of business rescue proceedings

Chapter 27 Conduct of business rescue proceedings

Chapter 28 Compromise with creditors

Part 9

Cross-border insolvency

Chapter 29 Cross-border insolvency

Appendices

Appendix 1: Specimen applications and forms

Appendix 2: Insolvency Act 24 of 1936

Appendix 3: Companies Act 61 of 1973, Chapter XIV

Appendix 4: Companies Act 71 of 2008, Chapter 2, Part G

Appendix 5: Companies Act 71 of 2008, Chapter 6

Appendix 6: Close Corporations Act 69 of 1984, Part IX

Appendix 7: Cross-Border Insolvency Act 42 of 2000

Table of cases

Table of statutes

Index

Part 1

Introduction

Chapter 1: Introduction

- 1.1 Meaning of 'insolvency'
 - 1.2 Purpose of a sequestration order
 - 1.3 What may be sequestrated
 - 1.4 Jurisdiction of the court
 - 1.5 The Master
 - 1.6 Condonation of irregularities
 - 1.7 Historical overview
-

Chapter 1

Introduction

Synopsis

- 1.1 Meaning of 'insolvency'
- 1.2 Purpose of a sequestration order
- 1.3 What may be sequestrated
 - 1.3.1 Meaning of 'estate'
 - 1.3.2 Meaning of 'debtor'
- 1.4 Jurisdiction of the court
 - 1.4.1 Which court has jurisdiction
 - 1.4.2 Jurisdiction over a debtor and his estate
 - 1.4.3 Jurisdiction in litigation against third parties
 - 1.4.4 Competing courts—removal to another court
- 1.5 The Master
- 1.6 Condonation of irregularities
- 1.7 Historical overview
 - 1.7.1 Roman law
 - 1.7.2 Roman-Dutch law
 - 1.7.3 South African law

1.1 Meaning of 'insolvency'

In common parlance, a person is insolvent when he cannot pay his debts. But the legal test of insolvency is whether the debtor's liabilities, fairly estimated, exceed his assets, fairly valued (*Venter v Volkskas Ltd* 1973 (3) SA 175 (T) 179; *Ex parte Harmse* 2005 (1) SA 323 (N) 325). Inability to pay debts is, at most, merely evidence of insolvency.

A person who has insufficient assets to discharge his liabilities, although satisfying the test of insolvency, is not treated as insolvent for legal purposes unless his estate has been sequestrated by an order of the court. A sequestration order is a formal declaration that a debtor is insolvent. The order is granted either at the instance of the debtor himself (voluntary surrender: see chapter 2) or at the instance of one or more of the debtor's creditors (compulsory sequestration: see chapter 3).

The terms 'sequestration' and 'sequestration order' should strictly be used only with reference to a person's estate. A debtor's estate is sequestrated, not the debtor himself. But both a debtor's estate and the debtor himself may properly be described as 'insolvent'. When the word 'insolvent' is used to describe a debtor, it carries two possible meanings: either that the debtor's estate has been sequestrated, or that his liabilities exceed his assets (cf s 2 of the Insolvency Act 24 of 1936, definition of 'insolvent'). So the notion of 'becoming insolvent' has a wider meaning than that

of 'being sequestrated' (*Land- en Landboubank van Suid-Afrika v Joubert NO* 1982 (3) SA 643 (C) 648).

1.2 Purpose of a sequestration order

The main objective of a sequestration order is to secure the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors. It is essential to distinguish between individual initiatives by creditors to recover their debts from the debtor, on the one hand, and the collective debt-collection procedure that is possible in insolvency proceedings, on the other.

If the individual creditor's letter of demand to the debtor to pay the debt does not yield success, the creditor issues summons and asks the court for a judgment. The judgment is given effect by the judgment creditor's issuing a warrant of execution for the sheriff to seize the debtor's assets and sell (realize) them so that the creditor may receive payment from their proceeds. Alternatively, with a garnishee order the creditor requires the third party (such as a debtor's employer) who owes money to the debtor to pay the creditor instead, often in instalments. Executing against the property of a debtor who is in insolvent circumstances inevitably leads to one or a few creditors being paid, and the rest receiving little or nothing at all.

To prevent this selective outcome favouring one or a few creditors of the debtor, the collective debt-collection procedure of insolvency proceedings is followed. The legal machinery that comes into operation on sequestration is designed to make sure that whatever assets the debtor has are liquidated and distributed among all his creditors according to a predetermined (and fair) order of preference.

The law proceeds from the premise that once an order (or provisional order) of sequestration is granted, a *concursum creditorum* ('coming together of creditors'; a concourse of creditors) is established, and the interests of creditors as a group enjoy preference over the interests of individual creditors (*Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 223). The debtor is divested of his estate and cannot burden it with any further debts. And a creditor's right to recover his claim in full by judicial proceedings is replaced by the right, on proving a claim against the insolvent estate, to share with all other proved creditors in the proceeds of the estate assets. Apart from what the Act allows, nothing may be done which would have the effect of diminishing the estate assets or prejudicing the rights of creditors (*Ward v Barrett NO & another NO* 1963

(2) SA 546 (A) 552). In *Walker v Syfret* NO 1911 AD 141 166, Innes J explained the underlying principle as follows:

'The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

After the debtor has been placed in winding-up and the *concursum creditorum* arises, a creditor may still seek to rectify an agreement if the creditor was already a secured one at the time of winding-up (*Voltex (Pty) Ltd v First Strut (RF) Ltd (in Liquidation) & others* 2022 (3) SA 550 (GP)).

Page 5

The law of insolvency exists primarily for the benefit of creditors (cf *Ex parte Pillay; Mayet v Pillay* 1955 (2) SA 309 (N) 311), and so a court will not sequester a debtor's estate unless it is shown that the sequestration will be to the advantage of creditors. So sequestration will generally not be resorted to if the debtor, although insolvent, has only one creditor who already holds a judgment against the debtor. Then the normal execution procedure offers a less expensive means of exacting from the debtor whatever amount he can pay (cf *Gardee v Dhanmanta Holdings & others* 1978 (1) SA 1066 (N); *Absa Bank Ltd v De Klerk and related cases* 1999 (4) SA 835 (E) 839; *Lynn & Main Inc v Mitha* NO 2006 (5) SA 380 (N) 383; *Body Corporate of Empire Gardens v Sithole & another* 2017 (4) SA 161 (SCA) 164–5). And sequestration will not be ordered if the assets in the debtor's estate will be consumed by placing the estate under sequestration and there will be nothing left over for creditors. The court will make an order of

sequestration only if the expected result will be an appreciable dividend for creditors. The requirement of advantage to creditors is explored in 2.23 and 3.1.3.

Advantage to creditors is still the leading principle of the South African pro-creditor law of insolvency (Smith (1985) 7 *Modern Business Law* 27). This approach is out of step with the prevailing, pro-debtor approach of many other legal systems, such as that of the United States of America (in the Bankruptcy Reform Act of 1978), which is in favour of allowing the debtor a fresh start (for details, see Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 10 ed (2019) para 1.1). And debtors who have no income and no assets (so-called NINA debtors) may complain that the South African insolvency system infringes their constitutional right to equality by discriminating against them because of their socio-economic status (*ibid*).

Although sequestration was not designed to alleviate the position of the debtor, it inevitably has this effect because it relieves him from legal proceedings by creditors and allows him, through rehabilitation, to free himself from all unpaid pre-sequestration debts (s 129(1)(b)). Sequestration ending in rehabilitation is still the only way for the debtor to obtain a discharge of debts. This discharge is impossible through other debt-relief measures such as the administration order (s 74 of the Magistrates' Courts Act 32 of 1944 and Rule 48) and debt review (ss 86 and 87 of the National Credit Act 34 of 2005), which are debt repayment plans. Again, NINA debtors face a perpetual inability to obtain a discharge of their debts.

A further function of insolvency proceedings is to protect creditors against other creditors' greediness and dishonesty (*Richter NO v Riverside Estates (Pty) Ltd (supra)* 223).

Because insolvency law aims to make sure that creditors receive an equitable share of the debtor's estate, it is

sometimes considered just an elaborate system of execution. In some legal systems, for instance, insolvency law is classified under civil procedure rather than under mercantile law, as in our system. But the notion that insolvency law is merely a system of execution is simplistic. If it were merely this, sequestration would affect only the debtor's assets, but, as will be noted later (chapter 4), sequestration also affects the debtor personally, restricting his capacity and freedom to conclude contracts, to follow a chosen vocation, to litigate, and to hold office. In *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA) 601, the court accepted that a sequestration order is 'not an ordinary judgment entitling a creditor

to execute against a debtor'. It affects 'not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent'. It followed that sequestration proceedings instituted because of the breach of a credit agreement could not be classified as 'legal proceedings to enforce the agreement' as envisaged by s 129(b) of the National Credit Act 34 of 2005. Cachalia JA remarked (*idem* 600): '[An] order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestering creditor's claim, and sequestration is thus not a legal proceeding to enforce an agreement.' (See also *FirstRand Bank Ltd v Kona & another* 2015 (5) SA 237 (SCA) 241–3.)

1.3 What may be sequestered

The Act provides for the sequestration of the 'estate' of a 'debtor'.

1.3.1 Meaning of 'estate'

An estate is usually conceived of as a collection of assets and liabilities (cf *Ex parte Foxcroft* 1923 OPD 234 235). Yet a debtor who has only liabilities may be regarded as having an estate for sequestration purposes. In *Miller v Janks* 1944 TPD 127, M had acquired an estate through his occupation as a professional gambler. His assets had since disappeared under suspicious circumstances, leaving only liabilities. His wife possessed fixed property which she had received while M was pursuing his occupation. The court granted an order sequestrating M's estate. It rejected M's argument that as he no longer had any assets, he had ceased to have an estate and so sequestration was impossible. Murray J observed (*idem* 132):

'A debtor who has £1,000 assets and £2,000 liabilities has an estate, though one insolvent to the extent of £1,000: he does not cease to have an estate when the next day he pays over his £1,000 to his creditors, and remains insolvent to the same extent [A]n estate . . . is [no] less an estate because at one time it has only assets, at another time only liabilities, and at yet another time both assets and liabilities.'

The joint estate of spouses married in community of property is an estate for the purposes of insolvency. A debtor married in community of property does not have a separate estate which can be sequestrated, even where he (or she) is carrying on a business independently of his (or her) spouse (*Ex parte Vally* 1930 CPD 304; *De Wet NO v Jurgens* 1970 (3) SA 38 (A) 48). The spouses are both debtors and, on the sequestration of their joint estate, they both become insolvent debtors for the purposes of the Act (*Acar v Pierce and other like applications* 1986 (2) SA 827 (W) 830; *Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA) 676; *Berrange NO v Hassan & another* 2009 (2) SA 339 (N) 369). On divorce, each spouse regains a separate estate which must obviously be sequestrated separately (sequestration does not extinguish the liability of the solvent spouse for debts of the joint estate: s 17(5) of the

Matrimonial Property Act 88 of 1984; *Maharaj v Sanlam Life Insurance Ltd & others* 2011 (6) SA 17 (KZD) 19–20).

However, if the divorce takes place after a creditor has already acquired the right to apply for the sequestration of the joint estate, then the creditor is required to sequester the separate estates of both spouses (*BP Southern Africa (Pty) Ltd v Viljoen en 'n ander* 2002 (5) SA 630 (O) 638).

Page 7

A debtor married out of community of property has a separate estate that can be sequestered. As will be seen later (6.1), though, the solvent spouse's assets are also affected by the order, since they vest in the trustee of the insolvent estate until the solvent spouse can establish her (or his) title to them.

A debtor whose estate has been sequestered may, during his insolvency, acquire a new estate under a title valid against his trustee. This new estate may itself be voluntarily surrendered (*Ex parte Foxcroft (supra)*) or compulsorily sequestered at the instance of a creditor (*Ex parte Geeringh* 1980 (2) SA 788 (O) 789). Compulsory sequestration is possible, it seems, even where the assets in the second estate have been dissipated by the time the application for sequestration is made (*Miller v Janks (supra)*).

1.3.2 Meaning of 'debtor'

A 'debtor' for the purposes of the Insolvency Act is 'a person or a partnership, or the estate of a person or partnership, which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies' (s 2). An entity or association of persons is considered 'a debtor in the usual

sense of the word' if it can possess an estate and incur debts (*Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly & another NNO* 1984 (1) SA 160 (W) 163). The law governing the liquidation of insolvent companies is Chapter 14 (ss 337–426) of the Companies Act 61 of 1973. These provisions were left in operation by the Companies Act 71 of 2008 and, for the time being, apply to the winding up and liquidation of companies (and other entities) under the latter statute (see further chapter 23). The entities that may be placed in liquidation, according to s 337 of the 1973 Act, are a company, an 'external' company (one registered outside the Republic and meeting certain requirements: see s 1 of the 1973 Act), and 'any other body corporate' (s 337 of the 1973 Act). (The possibility of winding up an external company under the 2008 Act is a controversial issue (see chapter 23 introduction).) 'Body corporate', in this context, refers to a juristic person or *universitas*, ie, an association of persons that has perpetual succession and is capable of holding property and of suing and of being sued in its corporate name (*Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly & another NNO* (*supra*) 163).

The term 'debtor', therefore, embraces the following:

- A natural person.
- A partnership—even one whose members are all juristic persons (*Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA) 306, overruling *P de V Reklame (Edms) Bpk v Gesamentlike Onderneming van SA Numismatiese Buro (Edms) Bpk en Vitaware (Edms) Bpk* 1985 (4) SA 876 (C)).
- A deceased person and a person incapable of managing his own affairs (cf s 3(1)).

- An external company that does not fall within the definition of 'external company' in the Companies Act 61 of 1973, eg, a foreign company that has not established a place of business in the Republic (*Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffskommerz Aussenhandels Betrieb der VVB Schiffbau intervening* 1979 (4) SA 745 (N) 751).

Page 8

- An entity or association of persons that is not a juristic person, such as a trust (*Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly & another NNO (supra); Commissioner for Inland Revenue v Friedman & others NNO* 1993 (1) SA 353 (A) 356). Although a trust falls within the definition of a 'juristic person' in s 1 of the Companies Act 71 of 2008, it does not meet the definition of a 'company' in that Act (a juristic person incorporated in terms of that Act) and so it cannot be liquidated under Chapter 14 of the 1973 Act (*Melville v Busane & another* 2012 (1) SA 233 (ECP) 234–7).

A body corporate established in terms of the Sectional Titles Act 95 of 1986 is a 'body corporate' as referred to in the definition of 'debtor' in the Insolvency Act and so is incapable of being sequestrated. It also cannot be wound up for non-payment of its debts or because of its insolvency. The legislature did not intend the law governing the winding-up of insolvent companies to apply to bodies corporate (*Reddy v Body Corporate of Croftdene Mall* 2002 (5) SA 640 (D) 645–7).

As the references to the company legislation in the fourth and fifth bullet above suggest, it is essential to note that the separate but interconnected system for winding up and liquidating companies (see chapter 23 introduction for more

details) in South Africa differs from those of other countries such as the United States of America and the United Kingdom, which have legislation covering both natural persons (human beings) and juristic persons (such as companies): see the Bankruptcy Reform Act of 1978 in the United States of America, and the Insolvency Act 1986 (c. 45) in the United Kingdom. Instead, in South Africa, broadly speaking, the sequestration of the estates of natural persons is dealt with in the Insolvency Act, and the winding up and liquidation of companies are dealt with in the Companies Act 71 of 2008. As mentioned above, the 2008 Companies Act preserves, as an interim measure, specific provisions of the otherwise repealed Companies Act 61 of 1973. The 1973 Companies Act also cross-refers to various provisions of the Insolvency Act; the Close Corporations Act 69 of 1984 cross-refers to the 2008 Companies Act; and several other statutes also affect the relevant law of insolvency. So a comprehensive approach addressing many statutes as well as the supporting common law may well have to be followed in analysing the facts of a case and applying the appropriate law to them.

Nor is winding-up and liquidation the only outcome possible for companies and close corporations. Instead, both these forms of juristic persons may be the subject of corporate rescue—the chief worldwide concern and mission of the twenty-first century. In South African law, corporate rescue in its formal version consists of business rescue and a compromise with creditors, both found in Chapter 6 of the 2008 Companies Act (see chapters 25 to 27 on business rescue and chapter 28 on compromise with creditors). Corporate rescue may also be possible through an informal agreement concluded in the shadows of the law. The problem then, though, is that this informal agreement requires the consent of the debtor and all the creditors (*De Wit v Boathavens CC (King & another intervening)* 1989 (1)

SA 606 (C) 611)—an outcome which, given human nature, is usually difficult to achieve.

The reference to a foreign company in the fourth bullet above also hints at another aspect of insolvency law. In our interconnected contemporary world, a debtor may well have assets and liabilities in more than one country. Suppose that the debtor experiences financial problems in one country and his estate is sequestrated or (in

the case of a company) the company is placed in liquidation. The trustee or liquidator may be keen to visit other countries to search for and realize assets whose proceeds can then help pay the debts in the country where sequestration or winding-up took place. And if there is a foreign insolvency or winding-up order, the foreign trustee or liquidator may visit South Africa in search of assets to realize and take back the proceeds of to help pay the debts in the foreign sequestration or winding-up. This area of insolvency law is known as cross-border insolvency law and is discussed in chapter 29.

1.4 Jurisdiction of the court

1.4.1 Which court has jurisdiction

As a rule, only a Provincial or Local Division of the High Court may adjudicate upon an insolvency matter (s 2 *sv* definition of 'court'). Yet a magistrate's court may preside over prosecutions for criminal offences under the Insolvency Act (see 22.1), proceedings to set aside voidable dispositions (see 12.3.2), and a few other matters, provided, in each case, the ordinary jurisdictional limits as to offence, person and amount, imposed by the Magistrates' Courts Act 32 of 1944, are not exceeded (*ibid*).

1.4.2 Jurisdiction over a debtor and his estate

In terms of s 149(1), a court has jurisdiction 'over [a] debtor and in regard to the estate of [a] debtor' if:

- on the date when the application for voluntary surrender or compulsory sequestration of the debtor's estate is lodged with the Registrar of the court, the debtor is domiciled, or owns property, or is entitled to property, situated within the jurisdiction of the court (s 149(1)(a)); or
- at any time within the 12 months immediately preceding the lodging of the application, the debtor ordinarily resided or carried on business within the jurisdiction of the court (s 149(1)(b)).

(i) Domicile or property within jurisdiction

A personal right, ie, a right to a performance of some kind, is taken to be situated where the debtor liable to render the performance is domiciled. In *Nahrungsmittel GmbH v Otto* 1993 (1) SA 639 (A), N applied to sequester the estate of O, a German citizen who was imprisoned in Germany. N sought to found jurisdiction on the fact that O had been awarded costs in an earlier court case decided in South Africa. N argued that because of this award, O owned or was entitled to property situated within the court's jurisdiction. The court held that the location of the right to costs, being intangible property with no physical existence, followed the domicile of the debtor liable to pay the costs. This debtor was a German company resident in Germany. It followed that the right was located in Germany, not within the jurisdiction of the South African court.

(ii) Residence or business within jurisdiction in preceding 12 months

The debtor need not have ordinarily resided or carried on business for the entire 12 months preceding the application:

ordinary residence or conduct of business *at any time* during that period suffices. Yet 'ordinary residence' means something more prolonged

than a temporary stay (*Philips v Commissioner of Child Welfare, Bellville* 1956 (2) SA 330 (C) 334; *Commissioner for Inland Revenue v Kuttel* 1992 (3) SA 242 (A) 247).

1.4.3 Jurisdiction in litigation against third parties

Section 149 deals with the question of when a court has jurisdiction over a debtor and his estate: it is not relevant where the trustee of an estate litigates against third parties. So, in proceedings to set aside a voidable disposition made to a third party before sequestration, the ordinary rules of jurisdiction apply, and the trustee cannot rely on s 149 (*Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A)).

1.4.4 Competing courts—removal to another court

A court having jurisdiction over a debtor may refuse (or postpone) the surrender or sequestration of his estate if it appears to the court equitable or convenient that his estate should be sequestrated by another court within the Republic (s 149(1) proviso). The court may order that the matter be transferred to the other court (s 27 of the Superior Courts Act 10 of 2013). The transferee court need not have original jurisdiction (*Mulder & another v Beacon Island Shareblock Ltd* 1999 (2) SA 274 (C)).

In deciding whether another court should make a sequestration order, a court must consider whether, on the particular facts, and in the light of factors such as the convenience of the parties and the court and the general

disposal of litigation, the transferee court should dispose of the matter (*ibid*). The essential inquiry is not where the sequestration order may more conveniently be granted, but where the estate may more conveniently be administered (in other words, what the court must consider is what will happen *after* the order has been granted). So in *Goode, Durrant and Murray (SA) Ltd & another v Lawrence* 1961 (4) SA 329 (W), the court transferred a sequestration application from the Witwatersrand to the Durban court because most of the matters which the trustee would have to investigate arose in the Durban area, and the parties whom the trustee would have to examine—the debtor, his wife and their witnesses—all resided in that area. In the court's view, the presence of the sequestrating creditors in the Witwatersrand was not enough to alter the balance of convenience.

In *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffskommerz Aussenhandels Betrieb der VV Schiffbau intervening* 1979 (4) SA 745 (N), the court declined to sequester a foreign company on the grounds that it would be more equitable and convenient for it to be sequestered in its own domicile. The debtor, RS Co, was registered in the Republic of Liberia with its registered office in Monrovia. RS Co had no place of business in the Republic but owned a ship lying in Durban harbour at the time of the application. The Natal court accepted that it had jurisdiction to sequester RS Co, but it held that sequestration should rather be left to a court where the debtor was domiciled. Factors that weighed with the court were: RS Co's only link with South Africa was the fortuitous presence of its ship in Durban harbour; the creditors' claims relating to the ship were based on contracts concluded outside South Africa; the order of preference of claims in respect of RS Co's movable property would have to be decided according to

the law of its domicile; and if a purchaser were to buy the ship from a local trustee, his title might not be

recognized outside South Africa. The details of administering the insolvent estate of such a foreign company in South Africa are also unclear.

These decisions may be contrasted with *Deutsche Bank AG v Moser & another* 1999 (4) SA 216 (C), in which the court refused to relinquish jurisdiction in favour of a foreign court. The debtor, a German citizen, resided with his wife in Germany and owed debts there. But he owned immovable property within the court's jurisdiction and owned virtually no assets in Germany. The court held that it was more convenient for it, rather than a German court, to adjudicate on the matter, especially since a foreign order of sequestration would not, by itself, divest the debtor of his immovable property in South Africa and so might not produce any advantage to creditors.

1.5 The Master

A Master is appointed in terms of the Administration of Estates Act 66 of 1965 to each of the areas of the Provincial Divisions of the High Court. Masters at the nine main seats of the single High Court exercise jurisdiction throughout their respective whole provinces, and Masters at local seats do so in the defined portion of those provinces (s 2(1)(a)(ii) of the Administration of Estates Act 66 of 1965; *Murray NO & others v African Global Holdings (Pty) Ltd & others* 2020 (2) SA 93 (SCA) 100–1). The Master plays a pivotal role in insolvency matters, as will be seen from his many powers and duties flowing from the Act. One of his principal functions is keeping custody of all documents relating to insolvent estates (s 154(1)). In *Ex parte The Master of the*

High Court South Africa (North Gauteng) 2011 (5) SA 311 (GNP), Bertelsmann J remarked (*idem* 322):

'Every stage of the administration of insolvent estates and companies and close corporations under winding-up, from the launching of the original sequestration or liquidation application to the rehabilitation of the insolvent or the deregistration of the corporate entity, is controlled by the Master's office. Its duties include many specialised functions and administrative tasks that can only be carried out efficiently by a dedicated organisation that exists specifically for that purpose.'

See also *Motala v Master, North Gauteng High Court 2019 (6) SA 68 (SCA) 95*.

For performing various functions, the Master is entitled to charge prescribed fees. These are payable to the Department of Justice and Constitutional Development, either at a magistrate's court or directly into an appropriate bank account of the Department (s 153(1); para 4 of the Third Schedule; GN 1478 of 6 November 2009; *Government Gazette* No 32691).

The Master is a 'creature of statute' and, as such, has only the powers that the legislature grants him (*The Master v Talmud* 1960 (1) SA 236 (C) 238). He cannot act unless empowered to do so by statute, either expressly or by necessary implication (*Die Meester v Protea Assuransiematskappy Bpk* 1981 (4) SA 685 (T) 690; *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC) 853). He is not a judicial officer, and so cannot issue court orders or judgments.

Any person aggrieved by a decision, ruling, order or taxation of the Master may bring it under review by the court and, to that end, may apply to the court, after notice to the Master (s 151). To be reviewable in terms of the section, the decision, ruling, and so on, must be final in effect (not susceptible to alteration) and definitive

of rights. It must also have the effect of disposing of at least a substantial portion of the relief claimed (*Strauss & others v The Master & others NNO* 2001 (1) SA 649 (T) 659). A person is 'aggrieved' for these purposes if his legal rights have been infringed or if he has a legal grievance (*Francis George Hill Family Trust v South African Reserve Bank & others* 1992 (3) SA 91 (A) 102; *Jeeva & another v Tuck NO & others* 1998 (1) SA 785 (SE) 792). The right of review conferred by the section is not limited to the party against whom the Master's decision or ruling was pronounced (cf *Geduldt v The Master & others* 2005 (4) SA 460 (C) 465), nor is it limited to proved creditors (*Tongaat Paper Co (Pty) Ltd v The Master & others* 2011 (2) SA 17 (KZP) 22). Even the trustee of the estate may bring review proceedings as a 'person aggrieved' (*Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C) 788).

The type of review envisaged by the section is one in which the court has powers of both appeal and review with the additional power, if required, of receiving new evidence and entering into and deciding the whole matter afresh. The court is not restricted in exercising its powers to cases in which some irregularity or illegality has occurred (*Nel & another NNO v The Master (Absa Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA) 286). This position does not mean, though, that the court's powers under the section are unlimited and that it is free to disregard the factual material before the Master or the Master's reasoning. Only if the Master has erred or misdirected himself in a material respect, based on what was placed before him at the time, may the court intervene and exercise its powers under s 151 (*Al-Kharafi & Sons v Pema & others NNO* 2010 (2) SA 360 (W) 369).

1.6 Condonation of irregularities

As will appear from the following chapters, sequestrating and administering an insolvent estate involve many procedures. Often, a party making an application or taking some other step in terms of the Act will omit prescribed details, or fail to act within the time stipulated, or commit some other procedural breach. When this happens, it becomes important to establish whether what has been done is invalid because of the defect or irregularity.

The starting point is s 157(1), which provides that 'nothing done under the Act will be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court'. The effect of this section appears to be the following:

- If a formal defect (or irregularity) has not caused a substantial injustice, the procedural step in question is valid (see, eg, *Ex parte Cowley* 1950 (4) SA 161 (GW)). It is usually said that the court may 'condone' the defect in these circumstances, but this word seems incorrect, since s 157 does not confer on the court the power to condone defects (*Ex parte Slabbert* 1960 (4) SA 677 (T) 681-2).
- If a formal defect has caused a substantial injustice, but the prejudice to creditors can, in the opinion of the court, be remedied by an appropriate order, then the defect is not fatal, provided, of course, the party concerned complies with the corrective order (see, eg, *Ex parte van Rensburg* 1955 (1) SA 570 (O)).
- If a formal defect has caused a substantial injustice and the prejudice to creditors cannot be cured by any order of the court, then the procedural step is invalid.

There is some uncertainty over what is meant by 'formal' for these purposes. It has been held, for example, that a

defect is not formal if it might cause prejudice to creditors (*Ex parte Fakir* 1956 (4) SA 177 (C) 179), or if the provision which has been breached aims at some definite object which could be defeated by the lapse in procedure (*Ex parte Foley* 1954 (3) SA 1 (O) 3), or if the provision breached is peremptory (imperative) rather than merely directory (directive) (*Ex parte Marais & two others* 1957 (3) SA 311 (W)), or if the rights of a creditor would in any way be affected (*Western Flyer Manufacturing (Pty) Ltd v Dewrance & others NNO: In re Dewrance & others NNO v North West Transport Investments (Pty) Ltd (under Judicial Management) & others* 2007 (6) SA 459 (B) 469). The correct interpretation is probably the one adopted in *Ex parte Slabbert (supra)* 682: a formal defect is simply a departure from a prescribed or established procedure (cf *Ex parte Anderson* 1995 (1) SA 40 (SE) 43). The Constitutional Court applied s 157 to maintain the validity of the Master's conduct (*Swart v Starbuck & others* 2017 (5) SA 370 (CC)) but failed to consider the characterization of a 'formal defect' (*Stander and Kloppers* 2020 *Stell* LR 249).

The courts have recognized further grounds on which a breach in procedure may be overlooked or condoned:

- if the deviation is so slight as to fall within the maxim *de minimis non curat lex* (the law is not concerned with trifles) (cf *Ex parte Immerman* 1941 CPD 369 371-2);
- if all interested parties have waived compliance with the provisions of the Act (*Ex parte Nel* 1960 (3) SA 715 (GW));
- if the provision in question is not peremptory and has substantially been complied with (see, eg, *Ex parte Bosch & another* 1959 (2) SA 163 (C));
- if it was impossible for the party concerned to have complied with the Act (see, eg, *Ex parte Henri* 1974 (3) SA 717 (N)).

It is difficult to reconcile the last two grounds (substantial compliance and impossibility) with the provisions of s 157(1).

If a defect does not qualify as 'formal' for the purposes of s 157(1), and none of the grounds for condonation mentioned above is present, then the procedural step in question is invalid (see, eg, *Ex parte Foley (supra)*).

1.7 Historical overview

1.7.1 Roman law

Under the Twelve Tables (a set of foundational laws drawn up in 451 to 450 BC), if a debtor could not pay his debts, his creditors could seize him and sell him into slavery (*manus iniectio*) or, apparently, cut his body into pieces. In the latter regard, it was specifically provided that creditors were not to be prejudiced 'if they have cut more or less than their shares'. Between 326 and 313 BC, the *lex Poetelia Papiria* was passed, prohibiting the sale of a debtor into slavery in execution of a judgment debt. From then onwards, imprisonment in a public prison replaced sale into slavery as the punishment for an inability to pay debts.

Execution against the debtor's property, known as *missio in possessionem*, was introduced only in 167 or 104 BC. The *praetor* (one of the magistrates elected annually to the Roman judiciary) had to issue three decrees, each marking a distinct stage in the proceedings:

Page 14

- The first decree authorized one or more creditors to take possession of, protect and advertise for sale all the assets of the debtor.
- The second decree empowered creditors to choose from their number a manager (*magister bonorum*) to

- supervise the sale of the assets.
- The third decree authorized the sale, which was held a few days later.

The debtor's entire estate or *universitas iuris* was sold and transferred to the person who offered creditors the largest dividend on their claims. The process was known as *bonorum emptio*. In later times, a modified procedure was introduced. Instead of a *magister*, a *curator* was appointed by the creditors, subject to the sanction of the *praetor*. The *curator* sold the property in lots, as was most convenient or advantageous to creditors. This procedure was called *bonorum distractio*. The debtor kept some of his property and avoided the loss of legal and social standing (*infamia*) that *bonorum emptio* brought.

Relief to the debtor came in the form of the *lex Julia* (probably 48 BC), allowing a debtor to make *cessio bonorum*, ie, to surrender his estate to his creditors. Surrender exempted the debtor from arrest, imprisonment, slavery and *infamia*. Property which he later acquired could be sold to pay his debts, but (under the *beneficium competentiae* (benefit of competency)) he was entitled to keep as much as was necessary for his subsistence.

1.7.2 Roman-Dutch law

Cessio bonorum, in its main features, was introduced into Dutch law probably towards the latter part of the fifteenth century. The granting of a *cessio* was seen as a privilege which the court could in its discretion confer upon a debtor, and then only if his insolvency was due to misfortune. A *cessio* was initially administered under the supervision of a local magistrate but, during the eighteenth century, chambers were established, known as 'Desolate Boedelkamers', whose functions included administering insolvent estates. The Ordinance of Amsterdam, passed in 1777, formed the basis of much of the South African law of

insolvency (*Fairlie v Raubenheimer* 1935 AD 135 146). This ordinance also recognized the principle of rehabilitation that discharged the debtor from his pre-sequestration debts if the required majority of creditors approved.

1.7.3 South African law

(i) Insolvency Act

Roman-Dutch law arrived at the Cape of Good Hope with the Dutch in the seventeenth century. In 1803, a Desolate Boedelkamer was established there for the administration of abandoned estates and the execution of civil sentences, including the estates of all persons obtaining *cessio bonorum*. The Desolate Boedelkamer was abolished in 1818, and a sequestrator was appointed to exercise the functions of the chamber. This was not a success, and the office of sequestrator was abolished when Ordinance 64 of 1829 was passed to regulate the administration of insolvent estates. This was followed by several amending ordinances until it was repealed by Ordinance 6 of 1843. This ordinance is considered a landmark in the South African law of insolvency. It both consolidated and changed the law. One of the main changes it introduced was the abolition of *cessio bonorum*. Ordinance 6 of 1843 was taken over or followed in the other colonies and republics.

Page 15

After the Union of South Africa in 1910, the Insolvency Act 32 of 1916 replaced the existing statutory law. This Act was amended twice before being replaced by the Insolvency Act 24 of 1936, which is still in force. This statutory code neither states the insolvency law definitively nor prejudices common-law rights that are consistent with it (*Visser's Trustee v Spangenberg* 1920 CPD 73 75; *Fairlie v Raubenheimer* 1935 AD 135 146; *Du Plessis & another NNO*

v Rolfes Ltd 1997 (2) SA 354 (A) 363). South African insolvency law also influenced that of neighbouring countries applying Roman-Dutch common law: Botswana (formerly Bechuanaland), Lesotho (formerly Basutoland), Swaziland (now Eswatini), Namibia (formerly South-West Africa), and Zimbabwe (formerly Rhodesia). English law has sometimes been consulted too if Roman-Dutch law does not suffice (see, eg, *Copestake & others v Alexander* (1883–1884) 2 SC 137; *Evans & Co v Silbert* 1911 WLD 216).

(ii) Insolvency Act and law reform

Although sections of the Insolvency Act have been amended many times, it remains one of the older statutes of general application still in force. It is becoming increasingly difficult to synchronize the application of this Act with legal, economic, technological and commercial advances and with the unfortunate reality of constrained capacity and resources in contemporary South Africa. A few examples will suffice:

- Notices are still required to be published in Afrikaans and English newspapers or in these two languages (ss 34(1), 40(3) and 108(2)). The language requirements in ss 40(3) and 108(2), for instance, were set by the Insolvency Amendment Act 99 of 1965, which commenced on 7 July 1965. Forty-seven years later, the Republic recognizes 11 official languages (s 6(1) of the Constitution of the Republic of South Africa, 1996). South African Sign Language is on track to be added as the twelfth (s 1 of the Constitution Eighteenth Amendment Bill, 2022, amending s 6(1)(a) of the Constitution, gazetted for public comment in GN 1156 *Government Gazette* 47049 of 19 July 2022). Might it be time for a constitutional challenge (see 1.7.3(iii) below) to admit the possibility of satisfying these language

requirements in the Insolvency Act by expressing them in official languages and on news platforms accessible to the intended recipients?

- Modern methods of communication should also be harnessed where possible to help the insolvency process function more smoothly. Sometimes, the open-endedness of the 86-year-old Insolvency Act may still surprise, as when the use of email and WhatsApp was permitted in a recent case about the service of the rule *nisi* in compulsory sequestration (see 3.2.4). And, continuing this flexibility, by way of comparison, the courts may also now refer to a recent decision of the Court of Appeal of New York State on the use of an NFT (a non-fungible token) to serve court documents (*ibid*). The power of perseverance with modern methods of communication was proved in lockdown during COVID-19, when students and lecturers stayed in touch by cellphone to save the academic year, even if it meant climbing the nearest koppie in search of a signal. Courts continued online, keeping the wheels of justice turning and providing a glimpse of how to shed the constraints of bricks-and-mortar court rooms to reduce court delays. Participants awoke to the art of the electronically possible. The domestic employees of the debtor now need to be furnished with a copy of the debtor's application, and it has been ruled sufficient to leave them a letter on the kitchen table (see 3.2.2(v)). Why not send them an SMS

or a WhatsApp too? The use of an isiXhosa-language newspaper (*I'solezwe lesiXhosa*) and radio station (*Umhlobo Wenene*) was recommended as an effective way of reaching communities in the Eastern Cape

(Sustaining the Wild Coast NPC & others v Minister of Mineral Resources and Energy & others [2022]

ZAECMKHC 55 (1 September 2022) para 99). Where television or radio coverage may be poor or non-existent, WhatsApp may be better. What this set of circumstances points to is the wisdom of developing a powerful app for the Master of the High Court to carry all appropriate notices and notifications.

- Much reliance is placed on publication in the *Government Gazette* (we will spare readers the detailed list here) but the Government Printing Works has struggled to publish legal gazettes regularly and on time. So the South African Restructuring and Insolvency Practitioners Association (SARIPA) had to approach the court for relief. The court ordered that the respondents (including the Minister of Home Affairs and the Director-General of that department) had to ensure that the legal gazettes are published every Friday without interruption or delay, that all requests for quotations and publication of notices in those gazettes are attended to promptly, and that those notices appear in those gazettes as requested (*South African Restructuring and Insolvency Practitioners Association NPC v Chief Executive Officer: Government Printing Works & others [2021] JOL 51529 (GP)*).
- Insistence on notification by registered post fails to acknowledge that many South African Post Office (SAPO) branches are dysfunctional and that some intended recipients of notices might not have access to postal delivery. Should the private sector perhaps be admitted to this space to play a role in the efficient circulation of notices?
- The preferences for funeral and death-bed expenses in s 96, to a maximum of R600 in the aggregate, last adjusted in 1983 (see 16.3(i) and (ii), respectively),

have become so insignificant and disproportionate to typical expenses that they no longer serve the original policy justification.

- Again, the maximum amounts of employees' preferent claims for salary and remuneration have not been changed by the Minister in 22 years (see 16.3.2(vi)). Why not? Might it be the unspoken fear that if these amounts are raised, the South African Revenue Service (SARS) will then be told much more often that the free residue has been exhausted on the employees' claims and so the cupboard is bare for income tax claims, two rungs further down the ladder of ranking of claims, which is the formal name for a queue of insistent creditors?

We encourage readers to read the provisions of insolvency, winding-up and business rescue in context with a critical eye, and not be blinkered or beaten by the details. (Learners with a strong visual sense may benefit from using diagrams and timelines with a dash of colour to analyse complicated facts and apply complicated provisions; see 12.8 for suggestions and examples.) This approach, by turns sceptical and hopeful, may lead to fine insights and potent arguments to develop all these fields of law.

Fundamental policy issues should also be reconsidered: the country needs and deserves a new Insolvency Act that reflects the best and freshest thinking of 2022 and beyond, not 1936. The South African Law Reform Commission has, for several decades, been engaged in a project for the revision of insolvency law. It has considered various aspects, including the amalgamation into one enactment of the law governing the sequestration of individuals and the winding up of companies,

close corporations, and other juristic persons. So far, though, no fundamental changes have been made to the existing legislative framework. Although there are informal indications of work being done to prepare a Bill for public consultation, formal steps in this regard have not yet been announced.

What you learn and ponder in this book may inspire impetus and energy for the task. The central policy decision that faces South Africa now and informs most of the rest of the reform process is whether to persist with its creditor-friendly approach based on advantage to creditors, or whether to move towards the approach taken in several other countries of being more forgiving towards debtors who find themselves in insolvent circumstances and deserve a fresh start, as, for example, in the United States of America (see 1.2). After this policy decision, the rest becomes a question of working out the details. At stake is the urgent, anxious, longed-for wish of every debtor suffering financial difficulties: the possibility of a discharge from his or her debts, which is at present obtainable only through the narrow gate of a sequestration order (*ibid*). The manifestation of this drive for the sequestration order that will eventually unlock the discharge of debts in rehabilitation that ends the sequestration process (see chapter 19) is seen in the enduring determination to seek a 'friendly sequestration' (see 3.1.4). Despite all the requirements, precedents, guidelines, rejections, warnings and reporting of legal practitioners to their professional bodies, desperate debtors still persist in engineering these applications with the help of accommodating creditors in the hopes that theirs will be the application that succeeds.

Along with this central policy question, other fundamental assumptions of the law of insolvency and winding-up may be questioned. The equal treatment of creditors (*par condicio creditorum* or *paritas creditorum*) is often cited as

a basic principle, which, like many fundamental ideas that trip off the tongue, proves to be more nuanced and challenging when reconsidered. Its continued role and significance may be examined, as in Van der Linde and Calitz 'Equality, Legal Certainty and Insolvency' in Hugo and Möllers (eds) *Legal Certainty and Fundamental Rights: A Cross-Disciplinary Approach to Constitutional Principles in German and South African Law* (2020) 353. The debate over this principle and its relation to the constitutional right of equality (cf 1.7.3(iii)) provides insights into the purposes and functions of insolvency and winding-up, such as why secured creditors should continue to enjoy priority of treatment, whether the benefits flowing from their secured status should be shared with creditors holding other positions in the order of preference, and whether any statutory priorities should even be recognized in the distribution of the free residue and, if so, then which priorities (or which priorities should be re-established in restricted form if previously abolished) (see 16.3.2). Other rules for distributing the free residue may be explored, based on chronology, ethics, claim size and policy. The debate, in turn, teaches lessons about the nature and characterization of equality, and throws light on its constitutional aspects and their differences from the concept of equality in the law of insolvency and winding-up. Readers gain greater understanding of the truism that hard cases make bad law, the paradox that inequality may have to be embraced in order to achieve equality, the realism of keeping the economy thriving while extending help to the vulnerable where possible, and the realization that courts can only deal with the facts

in front of them, leaving the larger picture to be dealt with thoroughly and consistently by philosophers, policymakers

and legislators.

(iii) Constitution

After raising the possibility of a constitutional challenge above (see 1.7.3(ii), first bullet), we need to say more about the Constitution and its operation.

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides a basis for reforming all South African law. The Constitution is the supreme law of the land to which all other laws must conform (s 2). It contains a Bill of Rights (essentially, a chapter setting out a number of fundamental rights: ss 7 to 39) for testing the validity of all laws, including legislation. Insolvency laws pose a potential threat to several fundamental rights: for example, the right to equality (s 9); the right to freedom and security of the person (s 12); the right to privacy (s 14); the right to access to information (s 32); the right to property (s 25); and the right to just administrative action (s 33). So far, the Constitutional Court has been called upon to consider the constitutional validity of several insolvency provisions:

- s 21 of the Insolvency Act (upheld in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC));
- s 44 of the (now repealed) Insurance Act 27 of 1943 (held invalid in *Brink v Kitshoff* 1996 (4) SA 197 (CC));
- s 66(3) of the Insolvency Act (held invalid to the extent that it empowered a presiding officer at an interrogation who is not a judge or magistrate to issue a warrant of committal to prison (*De Lange v Smuts NO & others* 1998 (3) SA 785 (CC));
- the requirement of advantage to creditors should not be rigidified, and set minimum dividends of cents in the rand have been disapproved in hostile applications for compulsory sequestration (*Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC));

- a copy of the petition for sequestration to the debtor's employees must also be furnished to his domestic employees, and the petition must be made reasonably accessible to them (*ibid*);
- ss 21 and 22 of the Alienation of Land Act 68 of 1981 (cash purchasers of residential land paying the purchase price in under a year should also be protected as vulnerable purchasers who risk being rendered homeless by the seller's insolvency while the estate is being wound up (*Sarrahwitz v Maritz NO & another* 2015 (4) SA 491 (CC)); and
- the government's policy on the appointment of insolvency practitioners was held not to be reasonably capable of achieving equality and was also *ultra vires* the enabling Act (*Minister of Justice & another v SA Restructuring and Insolvency Practitioners Association & others* 2018 (5) SA 349 (CC)).

Further challenges may be made in the future.

It is essential to bear in mind that the mere fact that an insolvency provision conflicts with a fundamental right in the Bill of Rights does not mean that the provision is constitutionally invalid. The issue of constitutional invalidity involves a twofold inquiry:

- Does the provision conflict with a fundamental right?

Page 19

- If it does, is the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36)?

To decide the latter issue, account must be taken of all the relevant factors, including

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;

- the relation between the limitation and its purpose;
and
- less restrictive means to achieve the purpose (*ibid*).

Only if the provision is not reasonable or justifiable, taking all the pertinent factors into consideration, may the conclusion be drawn that it is unconstitutional.

Part 2

Obtaining a sequestration order

Chapter 2: Voluntary surrender

- 2.1 Who may apply
- 2.2 Requirements
- 2.3 Preliminary formalities
- 2.4 Effect of notice of surrender
- 2.5 Application for surrender
- 2.6 Court's discretion
- 2.7 Costs of surrender
- 2.8 Setting aside sequestration order

Chapter 3: Compulsory sequestration

- 3.1 Requirements
 - 3.2 Application for sequestration
 - 3.3 Court's discretion
 - 3.4 Costs of proceedings
 - 3.5 Unwarranted or vexatious proceedings
 - 3.6 Setting aside sequestration order
-

Chapter 2

Voluntary surrender

Synopsis

- 2.1 Who may apply
- 2.2 Requirements
 - 2.2.1 Debtor's estate insolvent
 - 2.2.2 Free residue sufficient to pay costs of sequestration
 - 2.2.3 Sequestration to be to advantage of creditors
- 2.3 Preliminary formalities
 - 2.3.1 Notice of intention to surrender
 - 2.3.2 Notice to creditors and other parties
 - 2.3.3 Preparation and lodging of statement of affairs
- 2.4 Effect of notice of surrender
 - 2.4.1 Stay of sales in execution
 - 2.4.2 *Curator bonis* may be appointed
 - 2.4.3 Potential compulsory sequestration
 - 2.4.4 No withdrawal of notice without consent
 - 2.4.5 Lapse of notice of surrender
- 2.5 Application for surrender
 - 2.5.1 Form and contents of application
 - 2.5.2 Filing of application at court
 - 2.5.3 Copy of application to 'consulting party'
 - 2.5.4 Master's report
 - 2.5.5 Opposition to application
 - 2.5.6 Adjudication on application
- 2.6 Court's discretion

2.7 Costs of surrender

2.8 Setting aside sequestration order

A debtor's estate may be sequestrated in two ways:

- The debtor himself (or his agent) may apply to court for the acceptance of the surrender of his estate (s 3(1)). This is known as voluntary surrender.
- A creditor or creditors (or his or their agent) may apply to court for the sequestration of the debtor's estate (s 9(1)). This is called compulsory sequestration.

The procedure and requirements for each method differ in material respects (although the consequences of the sequestration order are the same in both instances). This chapter deals with the first method of sequestration: voluntary surrender.

2.1 Who may apply

These persons may apply to surrender the estates mentioned:

Page 24

- Estate of a natural person: the debtor himself or his agent (s 3(1)). If an agent applies, he must be expressly authorized to do so (*Ex parte Brown* 1951 (4) SA 246 (N)).
- Estate of a deceased debtor: the executor (s 3(1)).
- Estate of a debtor who is incapable of managing his own affairs: the party entrusted with administering the estate, ie, the *curator bonis* (s 3(1)). In *Ex parte Houston* 1958 (1) SA 448 (N), the court granted an application for surrender brought by the *curator bonis* (curator of property) of a businessman who had disappeared without a trace.

- Partnership estate: all the members of the partnership (other than partners *en commandite* (silent partners whose identity is hidden and who do not take part in managing the partnership) or certain special partners) who reside in the Republic, or their agent (s 3(2)). In *Ex parte Bester & another* 1937 CPD 45, an application for surrender of a partnership estate was refused because only one member of the partnership had brought the application. The court held that one member of a partnership is not an agent of all the other members for s 3(2) purposes.
- Joint estate of spouses married in community of property: both spouses (s 17(4) of the Matrimonial Property Act 88 of 1984).

2.2 Requirements

The court may accept the surrender of a debtor's estate only if it is satisfied that:

- the debtor's estate is, in fact, insolvent;
- the debtor owns realizable property of sufficient value to defray all costs of the sequestration which will, in terms of the Act, be payable out of the free residue of his estate; and
- sequestration will be to the advantage of creditors (s 6(1)).

In addition, the court must be satisfied that certain preliminary formalities have been observed (*ibid*). These formalities are discussed in 2.3.

2.2.1 Debtor's estate insolvent

A debtor is insolvent if the amount of his total liabilities exceeds the value of all his assets (see 1.1). The extent of the debtor's assets and liabilities is generally determined by reference to the statement of affairs which he has to

prepare and file (see 2.3.3). Yet the court is not bound by the valuations in the statement (*Ex parte Van den Berg* 1962 (4) SA 402 (O) 404) and may make a finding of insolvency even where the statement (or other evidence adduced by the debtor) indicates that his assets exceed his liabilities. The test is whether it is established that the debtor is without funds to pay his debts in full and it is improbable that the assets will realize enough for this purpose (*Ex parte Harmse* 2005 (1) SA 323 (N) 326). In *Ex parte Greef* 1940 (2) PH C80 (C), the applicant's statement showed an apparent surplus of assets over liabilities of £559. According to a sworn appraiser's valuation of the assets, though, there was a deficiency of some £100. It was held that the applicant was insolvent and that the surrender should be accepted. Again, in *Ex parte Deemter* 1962 (2) SA 228 (E), the statement of the debtor's affairs showed that his assets exceeded his liabilities by a considerable sum, but he was being sued by several of his creditors for large amounts, he had failed to sell his major assets, and he had no other source of income. The court accepted that his estate

was insolvent and granted the application for surrender. In *Ex parte Harmse (supra)*, the applicant's statement showed an excess of assets over liabilities, but the only evidence that he adduced to prove otherwise were certain letters written by estate agents or valuers. The court held that the applicant had failed to adduce sufficient evidence to establish on a balance of probabilities that he was insolvent. Magid J remarked (*idem* 326):

'It is only acceptable and admissible evidence which can displace the *prima facie* inference of solvency when the applicant's own estimate of values exceeds the amount of the liabilities.'

2.2.2 Free residue sufficient to pay costs of sequestration

The 'costs of the sequestration' include the costs of surrender and also all the general costs of administration (s 97). 'Free residue' is defined in s 2 as 'that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention'. It includes the balance of the proceeds of encumbered property after discharge of the encumbrances. So, to calculate the amount of free residue in an estate, the surplus in value of encumbered assets over the amount of the encumbrances must be considered (*Ex parte Van Heerden* 1923 CPD 279). Goods bought by the debtor under an instalment agreement also form part of the free residue to the extent that their market value exceeds the balance outstanding under the transaction (*Mindel v Shaer* 1937 TPD 378). In *Ex parte Nortje* 1928 SWA 23, the debtor argued that a right to payment which he had ceded to other persons fell within the free residue because the cession could be set aside as an undue or voidable preference. The court did not agree because an action would be necessary to set aside the cession (if creditors decided on that step), and the action might or might not succeed.

A logical result of the requirement that the debtor must own sufficient property to meet the costs of sequestration is that a debtor who has no assets and only liabilities cannot surrender his estate. So in *Ex parte Collins* 1927 WLD 172, the court refused to grant an application for surrender because the debtor had only liabilities, even though the costs of sequestration had been guaranteed to the Master. It should be noted, though, that an estate consisting of only liabilities may be compulsorily sequestered (*Miller v Janks* 1944 TPD 127).

If the free residue is clearly insufficient, the court must refuse the application (*Ex parte Swanepoel* 1975 (2) SA 367 (O); *Ex parte Application: Shmukler-Tshiko* 2012 JDR 1796 (GSJ) paras 30–57). The insufficiency cannot be cured by the furnishing of a guarantee because the guarantee does not create an asset in the debtor's estate (*Ex parte Theron* 1923 OPD 46). But if it is unclear whether the free residue is sufficient, the court may grant the application, provided a guarantee for costs has been furnished to the Master's satisfaction. The guarantee in such a case is seen as removing the uncertainty (*Mindel v Shaer (supra)*).

2.2.3 Sequestration to be to advantage of creditors

The meaning of the expression 'advantage to creditors' is explained in the chapter on compulsory sequestration (3.1.3). It must be noted that the debtor must prove that sequestration *will* be to the advantage of creditors, while, in an application for compulsory sequestration, the creditor has to show merely that *there is reason to believe*

Page 26

that it will be. In other words, the onus is more strenuous in voluntary surrender than in compulsory sequestration. One reason for this, no doubt, is that a debtor can normally be expected to describe his own financial position in detail, while a sequestrating creditor would seldom have access to this information (*Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W) 581). Another reason is to reduce the ever-present risk of the debtor's abusing the sequestration procedure and resorting to sequestration when it holds little or no real benefit for creditors and simply gives the debtor a way to escape his liabilities (cf the problems posed by so-called

'friendly sequestrations'—see 3.1.4). Nor will the debtor be likely to allege against himself that an insolvency enquiry may lead to the disclosure of more assets for the advantage of creditors (*Ex parte Application: Shmukler-Tshiko (supra)* para 59). Clever creditors appreciate that this result may follow if they do not oppose the application for voluntary surrender.

Courts scrutinize batches of applications prepared by a particular firm of attorneys. Courts are concerned that the applications are superficial and have striking similarities in format and allegations, and in each case the projected dividend tends to fall within a narrow band, often 16 or 17 cents in the rand (*Ex parte Concato and similar cases* 2016 (3) SA 549 (WCC)). In the applications discussed in the *Concato* case, the superficiality of the allegations consisted in, for example, the failure to provide details and proof of the debtors' income as employees, how they were paid, the payment they received as commission, or the amount they owed on loans from their employer. A sum was sometimes mentioned as an expense for petrol without the associated vehicle being specified as an estate asset. Household goods, furniture and equipment were frequently mentioned with valuations but no explanation of how the debtor and the family would survive without these goods: the court thus inferred that these items would usually be repurchased as described in the paragraph below. Short-term credit featured without an explanation of why relief under the National Credit Act had not been explored or pursued. Irrelevant family or business history from years past and sympathy-seeking information featured more prominently than the details of why the debtors currently found themselves in insolvent circumstances. The court held that these applications for voluntary surrender must be dealt with on their merits (using reliable, detailed information)

and be genuine and not forced to fit a set formula yielding a convenient outcome.

Some applications also involve a 'buy-back' arrangement enabling the insolvent to repurchase his assets at a forced-sale value, usually on instalments. It is doubtful whether these arrangements meet the requirement of advantage to creditors. Many creditors would not bother proving their claims. And these 'buy-back' arrangements would enable the debtor to keep his assets and benefits, immune from his creditors, and free from having to pay them in terms of an arrangement or scheduling under the National Credit Act 34 of 2005. Creditors who did prove their claims would receive a trickle of dividends over years (*idem* 560–1 566–7).

2.3 Preliminary formalities

Section 4 sets out the steps to be followed before applying for voluntary surrender. As explained in chapter 1, formal defects do not necessarily invalidate the application.

Page 27

2.3.1 Notice of intention to surrender

The first step to be taken by a debtor who wishes to surrender his estate is the publishing of a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where he resides or, if he is a trader, in the district where he has his principal place of business. The notice must correspond substantially with Form A in the First Schedule. It must state:

- the full names, address and occupation of the debtor;
- the date on which, and the particular Division of the High Court before which, the application for acceptance of the surrender will be made; and

- when and where the debtor's statement of affairs will lie for inspection as required by the Act (see below).

Publication of the notice in the *Gazette* and a newspaper must take place not more than 30 days and not less than 14 days before the date stated in the notice as the date for the hearing of the application.

The purpose of the notice of surrender is to alert creditors as to the intended application, in case they should wish to oppose it. It follows that the notice must be published in a 'newspaper' in the usual sense, ie, a daily or weekly publication, containing reports on local or foreign happenings of recent occurrence and of a varied character, intended for the information of the general reader (cf *R v Lewin* 1930 AD 344 349). So in *Ex parte Goldman* 1930 WLD 158, it was held that a weekly journal devoted to Jewish interests and printed mostly in Yiddish, using Hebrew characters, was not a newspaper for the purposes of the statute. It follows, too, if the objective of alerting creditors is to be attained, that the newspaper chosen for publication must circulate in the area in which the debtor's creditors are located, even if the debtor no longer resides or carries on business there. In *Ex parte Barton* 1926 CPD 252, the notice had been published in a Western Cape newspaper, but the applicant had lived before in Durban, and all his creditors were in Natal (now KwaZulu-Natal). The court postponed the application so that the notice might be published in a Natal newspaper and the debtor's statement of affairs might lie for inspection in Durban. By contrast, in *Ex parte Vos* 1930 TPD 381 the court, facing a similar set of facts, relied on the proviso to s 150(2) of the 1916 Insolvency Act (cf s 149(1) of the present Act—see 1.4.4). The application was refused because it would be equitable or convenient for the debtor's estate to be sequestrated by the court having jurisdiction where his creditors were.

The 14-day time limit is to ensure that creditors have sufficient opportunity to read the statement of affairs carefully and decide whether to oppose the application. The legislature's objective in imposing the 30-day limit was

'that debtors should not be able to give long notice, months beforehand, and in that way keep creditors from levying execution and in the meantime dissipate all the assets' (*per* De Villiers JP in *Ex parte Meyer* 1927 OPD 170 170-1).

Failure to adhere strictly to the 30-day period has mostly been taken to be fatal to the application (see, eg, *Ex parte Oosthuysen* 1995 (2) SA 694 (T) 695-8), but in *Ex parte Harmse* 2005 (1) SA 323 (N) 329-30, the court held that the failure is a formal defect or irregularity as envisaged by s 157(1) and so does not invalidate the application unless it has caused a substantial injustice which cannot be remedied by a court order (see also 1.6).

Publication of the notice of surrender may be proved by means of an affidavit enclosing copies of the relevant *Gazette* and newspaper (or cuttings from these publications) (cf *Ex parte Wilson* 1921 CPD 377) or in some other appropriate manner (see also 2.5.1).

2.3.2 Notice to creditors and other parties

Within seven days after publication of the notice of surrender, the debtor must furnish copies of the notice to creditors and other parties, as set out below. Compliance with this requirement may be proved by means of an affidavit (made by either the debtor or his attorney) giving details of the steps taken (cf *Ex parte Harmse* 2005 (1) SA 323 (N) 331).

(i) Notice to each creditor

The debtor must deliver or post a copy of the notice to every one of his creditors whose address he knows or can ascertain (s 4(2)(a)). It seems clear that the object of this requirement is to provide further protection to creditors who may wish to contest the application or take steps to safeguard their interests. In *Ex parte Wassenaar* 1968 (2) SA 726 (T) 727, Hiemstra J observed that in requiring that creditors must be given personal notice of the intended application, the legislature was allowing for the fact that it cannot be expected of creditors continually to peruse the *Government Gazette* or the legal notices in newspapers. A failure to give notice to creditors in the prescribed manner will generally be considered fatal to the application (cf, eg, *Ex parte Rudolph* 1975 (3) SA 974 (E) 976; but see *Ex parte Harmse (supra)*) although the courts may, in certain circumstances, be prepared to condone non-compliance with the time period (see, eg, *Ex parte Hetzler* 1969 (3) SA 90 (T) 92–5, in which posting four days *before* publication was not considered to be a fatal defect).

(ii) Notice to trade union and employees

The debtor must post a copy of the notice to every registered trade union that, to his knowledge, represents his employees (s 4(2)(b)(i)). In addition, the debtor must give notice to the employees themselves, either:

- by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or,
- if the employees have no access to these premises, by affixing a copy of the notice to the front gate of the premises; or,
- failing the latter, by affixing a copy of the notice to the front door of the premises from which the debtor conducted any business immediately prior to the surrender (s 4(2)(b)(ii)(aa)–(bb)).

It would appear from these provisions that if the employees have access to the debtor's premises, he has to give notice by means of a notice board on the premises, even if this means erecting a notice board specifically for this purpose. The debtor's employees include his domestic ones (*Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC), overruling *Gungudoo & another v Hannover Reinsurance Group Africa (Pty) Ltd & another* 2012 (6) SA 537 (SCA)). These domestic employees must be furnished with a copy of the application for voluntary surrender (*Stratford & others v Investec Bank Ltd & others (supra)* 16–17; *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA)).

(iii) Notice to South African Revenue Service

The debtor must also send a copy of the notice by post to the South African Revenue Service (s 4(2)(b)(iii); cf *Chiliza v Govender* 2016 (4) SA 397 (SCA)).

2.3.3 Preparation and lodging of statement of affairs

(i) Preparation of statement

The statement of affairs referred to in the notice of surrender must be framed substantially according to Form B in the First Schedule. It consists of the following:

- A balance sheet.
- A list of immovable assets, with the estimated value of each asset and details of any mortgages on the assets—Annexure I.
- A list of any movable property not included in Annexures III or V (see below), setting out the value of each asset mentioned—Annexure II. Merchandise

(ie, stock-in-trade) listed in this annexure must be valued either at its cost price or at its market value at the time of the making of the affidavit verifying the statement of affairs (on which, see below), depending on which amount is the lower, and the annexure must be supported by detailed stock sheets relating to the merchandise. In *Ex parte Nel* 1954 (2) SA 638 (O), the applicant disclosed stock-in-trade in his annexure but failed to support it by detailed stock sheets, merely handing in at the hearing a stock book containing the relevant details. The court dismissed the application, holding that the omission to supply stock sheets is not a formal defect which the court can condone. Van Blerk J remarked (*idem* 639) that stock sheets are of material interest for creditors and are the only way in which the sheriff can determine the precise extent of the merchandise when he makes an attachment (see 8.2). This rule has not been applied in other divisions (eg, *Ex parte Dogo* 1938 WLD 187; *Ex parte Arnold* 1939 CPD 392; *Ex parte Lee* 1956 (4) SA 587 (D)). In *Ex parte Lee*, Milne J said (*idem* 587):

'I . . . think . . . that it is really a question of the degree of detail which should be furnished in any particular case. To some extent it seems that the question depends on whether it sufficiently emerges that there are sufficient assets to pay the costs of administering the [applicant's] estate In some cases it may be necessary to show considerable detail so that due possession of the assets surrendered may be taken by the sheriff and the trustee.'

Failure to mention realizable movable property where this property exists may lead to the dismissal of the application (cf *Ex parte Bouwer and similar applications* 2009 (6) SA 382 (GNP) 385–6).

- A list of debtors with their residential and postal addresses, details of each debt, and an estimate of how far the debts are 'good', or 'bad or doubtful'—Annexure III. In *Ex parte Silverstone* 1968 (2) SA 196 (O) 198, Hofmeyer J said:

'The object of the Legislature in requiring the applicant to furnish not only the name but also the residential as well as the postal address of his debtors, must doubtless have been to enable creditors to trace these debtors and so to form their own independent opinion of the applicant's estimated values of his good and bad debts.'

- In *Ex parte Silverstone (supra)*, the applicant, rather than giving the names and addresses of certain debtors, had merely stated 'sundry debtors'. The court held that

Page 30

the irregularity could not be condoned. Cf *Ex parte Murphy* 1929 EDL 168 171, in which the failure to give the addresses of several debtors was condoned, though the court did warn that it would soon have to take a more stringent approach to such repeated failures to meet the requirements of the Insolvency Act 1916. Debts due by persons in a foreign country are not necessarily 'bad' for these purposes (*Ex parte Lamain* 1921 SWA 42). The applicant need not supply the names of parties or the amounts that he paid in transactions which have already been completed, even though the transactions may stand to be impeached by the trustee (cf *Ex parte Berson; Levin & Kagan v Berson* 1938 WLD 107 112–13).

- A list of creditors, their addresses, and particulars of each claim and any security held for it—Annexure IV. This list should mention contingent creditors, eg, persons to whom the debtor has agreed to be liable as surety and co-principal debtor (*Cumes & Co v Sacher & another* 1932 WLD 213) and also, it would seem, any party who asserts that he is a creditor, even if the debtor disputes the claim (cf *Van Zyl v Lloyd* 1929 WLD 96 100–1).
- A list of any movable assets pledged, hypothecated, subject to a lien, or under attachment in execution of

a judgment—Annexure V. A description of each asset must be given, along with an estimate of its value, a description of any charge on it, the amount of the debt to which the charge relates, and the name of the creditor in whose favour the charge is. Property bought under an instalment agreement governed by the National Credit Act 34 of 2005, and not yet paid for in full, should be included in this annexure. This requirement follows from s 84(1) of the Insolvency Act (see 7.4.1).

- A list and description of every accounting book used by the debtor at the time of the notice of surrender or sequestration or at the time when he stopped carrying on business—Annexure VI.
- A detailed statement of the causes of the debtor's insolvency—Annexure VI.
- Certain personal information about the debtor, including details of any prior insolvency and rehabilitation—Annexure VIII.
- An affidavit, made by the debtor (or the person applying on his behalf), verifying that the statement of affairs is true and complete and that every estimated amount contained in it is fairly and correctly estimated. This affidavit may not be attested by the applicant's attorney (*Ex parte Du Toit* 1955 (3) SA 38 (W)).

On receiving the statement of affairs, the Master may specially direct the applicant to have any property mentioned in it valued by a sworn appraiser or a person designated by the Master for this purpose (s 4(4)). The court may also, when considering the application for surrender, call for an independent valuation (*Ex parte Prins & another* 1921 CPD 616). In the absence of any direction by the Master or the court, the debtor is not legally obliged to obtain an independent valuation in support of the values

given in his statement (if he does so unnecessarily, the cost of the appraisal will not be allowed as part of the costs of the sequestration: *Ex parte Kruger* 1947 (2) SA 130 (SWA)), but he may *in effect* be compelled to do this if he relies on the expected proceeds of a single asset to show that sequestration will be to the advantage of creditors. In *Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 124, it was held that an applicant who relies on the fact that he has immovable property which can be sold for the benefit of his creditors must include evidence from an expert proving the likely proceeds of the property in a forced sale (see also *Ex parte*

Page 31

Mattysen et Uxor (First Rand Bank Ltd intervening) 2003 (2) SA 308 (T) 312; *Ex parte Bouwer and similar applications (supra)* 388–9; *Investec Bank Ltd & another v Mutemeri & another* 2010 (1) SA 265 (GSJ) 271; *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 155). As a rule of practice in Gauteng, the valuer's affidavit must confirm that he personally inspected the assets, specifying the date, time and place of doing so, and the applicant's affidavit must confirm that he was present and pointed out the assets to the valuer when the latter viewed and valued them (*Ex parte Erasmus & another* 2015 (1) SA 540 (GP) 549 550).

In the case of the simultaneous surrender of a partnership estate and the private estate of a partner, a separate statement of affairs for each estate must be prepared (see 20.1). The costs of preparing the statement of affairs are part of the costs of sequestration and are, therefore, payable out of the estate.

(ii) Lodging of statement

The statement of affairs with supporting documents must be lodged in duplicate at the Master's Office (s 4(3)). If the debtor resides or carries on business in a magisterial district in which there is no Master's Office, he must lodge an additional copy of the statement at the office of the magistrate of that district (s 4(5)). This latter requirement does not apply to a debtor residing in the districts of Wynberg, Simonstown or Bellville in the Western Cape. The statement of affairs must lie for inspection by creditors at all times during office hours for a period of 14 days stated in the notice of surrender (s 4(6)). On the expiry of the inspection period, the Master and the magistrate (where the statement has lain with him) each issues a certificate to the effect that the statement has duly lain for inspection as advertised in the notice of surrender and the Master must state whether creditors have lodged objections with him. This certificate must be filed with the Registrar before the application is heard.

In *Ex parte Viviers et Uxor (Sattar intervening)* 2001 (3) SA 240 (T), the court accepted that a debtor who has already tried unsuccessfully to surrender his estate may lodge the same statement of affairs that he used in the earlier abortive application, provided the relevant facts and reasons for the surrender have remained unchanged. In the court's view, in the absence of any provision in the Act or other authority providing a legal impediment to the same material facts being used more than once, there was no reason why the debtor could not reuse his previous statement of affairs.

2.4 Effect of notice of surrender

The publication of a notice of surrender has important consequences.

2.4.1 Stay of sales in execution

After the publication of the notice in the *Gazette*, it is unlawful to sell any property in the estate which has been attached under a writ of execution or other similar process, unless the person charged with the sale (ie, the sheriff) could not have known of the publication (s 5(1)). Yet the court, or the Master, if he considers that the value of the property does not exceed R5 000, may order the sale of attached property to go ahead and direct how the proceeds of the sale must be applied (*ibid*). The creditor must show that it would be more to the advantage of the general body of creditors to go ahead with the sale than to hold it over (*Hulett v Gangat & others* 1932 NPD 682) or that the general body of

creditors would derive no benefit from holding over the sale (*Master of the Supreme Court v Nevsky* 1907 TS 268). The latter consideration applied in *Ex parte Pretoria Hypotheek Maatschappij* 1933 OPD 137. The applicant, a bondholder, had obtained judgment and attached the debtor's property in execution. The debtor's notice of surrender was due to appear in the *Gazette* on the day before the date appointed for the sale in execution. The evidence showed that the property would not realize enough to pay the applicant in full. The court held that, as concurrent creditors could have no interest in the sale, and as costs would be wasted if it were held over, it should be allowed to go ahead on the date advertised.

When the court authorizes the sale to proceed, it may direct that the proceeds be handed to the Master pending the outcome of the application for surrender (*Estate Hart v Robinson* 1936 GWL 24), or that the proceeds be retained by the officer charged with the sale until the date of the application and paid to the Master if the surrender is accepted, or otherwise applied in terms of the Rules of

Court (*Mayekiso's Estate v Menziwa* 1931 EDL 376). If the notice of surrender has been published but the sale of execution goes ahead and the immovable property is transferred, the High Court will seldom validate the transfer. The court will do so only if it confirms that the sale would be in the interest of the general body of creditors (*Fourie & another NNO v Edkins* 2013 (6) SA 576 (SCA)).

No period is fixed for the duration of the prohibition in s 5(1), but it seems that it continues until the day that the application for surrender is, or should have been, adjudicated upon by the court. If the officer charged with executing a writ holds a sale in execution that contravenes s 5(1), the sale is illegal, and the debtor can successfully resist proceedings brought by the buyer to enforce it. This principle applies even if the application for surrender is later refused (*Webb v Bergsma* (1887) 4 HCG 376). Yet if ownership of the property is transferred to the buyer under the illegal sale, the trustee of the estate cannot claim the property unless he proves that the buyer acted in bad faith and with the knowledge that the sale was unlawful (*Gibson NO v Iscor Housing Utility Co Ltd & others* 1963 (3) SA 783 (T); s 70 of the Magistrates' Courts Act 32 of 1944).

Publication of a notice of surrender does not affect other civil and criminal proceedings. Civil actions and criminal prosecutions may go ahead and attachments in execution of judgments may be made, even though the actual sale in execution is stayed (*Amod v The Messenger* 1909 TS 13).

2.4.2 Curator bonis may be appointed

Despite the publication of a notice of surrender, the debtor is still at liberty to deal with his property as he chooses. He may, for instance, sell it or pass a mortgage bond over it. As a safeguard against the debtor's dissipating his assets after publishing a notice of surrender, the Master may appoint a *curator bonis* to the debtor's estate (s 5(2)). (A

curator bonis is a legal representative appointed to manage another person's finances, property, or estate.) The appointment must be made in accordance with policy determined by the Minister (*ibid*). The *curator bonis* is obliged immediately to take the estate into his custody and assume control of any business or undertaking of the debtor, as the Master may direct (*ibid*). The estate remains vested in the debtor because the *curator bonis* is only a caretaker (*Moosagee v Bhyat & Co* 1921 TPD 465). The *curator bonis* must open a bank account and is subject to the same provisions in this regard as a trustee (ss 5(2) and 70; and see 11.6). The *curator bonis* is entitled to reasonable

remuneration for his services, taxed by the Master (s 63(1)). The remuneration forms part of the costs of sequestration (s 97(2)(c)).

2.4.3 Potential compulsory sequestration

If, after publishing a notice of surrender, the debtor fails to lodge a statement of his affairs, or lodges a statement which is incorrect or incomplete in a material respect, or fails to make the application to court on the appointed day, and the notice of surrender is not properly withdrawn, the debtor commits an act of insolvency which entitles a creditor to apply for the compulsory sequestration of the debtor's estate (s 8(f)). Acts of insolvency are discussed in the next chapter.

2.4.4 No withdrawal of notice without consent

A notice of surrender published in the *Gazette* cannot be withdrawn without the Master's written consent (s 7(1)). The debtor may apply to the Master for his consent and the

Master must give it if it appears to him that the notice was published in good faith and that there is good cause for its withdrawal (s 7(2)). Withdrawal takes effect upon publication of a notice of withdrawal together with the Master's consent in the *Gazette* and in the newspaper in which the notice of surrender was published (*ibid*). The debtor must pay the cost of publication (*ibid*).

2.4.5 Lapse of notice of surrender

The notice of surrender (and so the debtor's application for surrender) lapses if the court does not accept the surrender, or if the notice of surrender is properly withdrawn in terms of the Act (see above), or if the debtor fails to make the application for surrender within 14 days after the date advertised as the date of the hearing of the application (s 6(2)). In *Ex parte Viviers et Uxor (Sattar intervening)* 2001 (3) SA 240 (T), the debtors had, before publishing their present notice of surrender, published a notice of surrender which had lapsed because the 14-day period had expired. The court rejected the argument that they were prevented from surrendering their joint estate because the earlier notice had not been withdrawn in terms of the Act. The court held that, as the first notice had become void on the expiry of the 14-day period, there was nothing for the applicants to withdraw before launching their present application.

If a *curator bonis* has been appointed under s 5(2) to look after the debtor's assets, the control of the estate must be restored to the debtor once the Master is satisfied that sufficient provision has been made for paying all costs incurred by the *curator* under that section (s 6(2)).

2.5 Application for surrender

2.5.1 Form and contents of application

The application for surrender is brought by way of a notice of motion supported by affidavit (for a precedent, see Appendix 1, specimens 1.1 and 1.2). The purpose of the founding affidavit(s) is to persuade the court that the four requirements for voluntary surrender have been satisfied. The court papers should contain the following information:

Page 34

- The full name, status, occupation and address of the applicant. It should be made to appear that the court has jurisdiction to hear the application (see 1.4.2) and that the applicant has *locus standi* (legal standing) to bring it. If application is made through an agent, it must be shown that the agent has express authority to bring the application (*Ex parte Brown* 1951 (4) SA 246 (N)).
- An allegation to the effect that the debtor is insolvent and facts that prove this. It is customary to attach a copy of the debtor's statement of affairs and refer to this to prove insolvency. Any vagueness or apparent inconsistencies in the statement of affairs may be clarified in the affidavit (*Ex parte Hay Automobile Company* 1931 GWL 23). If the statement of affairs reflects a surplus of assets over liabilities, the applicant must supply additional evidence to show that the assets will probably not yield enough to discharge his liabilities in full (*Ex parte Harmse* 2005 (1) SA 323 (N) 326).
- An explanation of how the insolvency came about. The causes of the debtor's insolvency should be detailed to enable the court to determine whether the application is in good faith (cf *Ex parte Bouwer and similar applications* 2009 (6) SA 382 (GNP) 385–6).
- An averment that the applicant owns realizable property of sufficient value to defray all the costs of

sequestration which will under the Act be payable out of the free residue of his estate. It is again usual to refer to the statement of affairs in support of this allegation. It has been held that the applicant should try to specify the costs of sequestration with precision and that it is not enough for him or his attorney to make a rough estimate (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 121). In *Ex parte Kelly* 2008 (4) SA 615 (T) 618–19, Southwood J explained:

'Where the applicant's attorney presents to the court an application for voluntary surrender or sequestration in which allegations are made that the costs of the sequestration will amount to a stated figure, and the court grants that application, it does so in the belief that those figures are correct Even though the court does not make an order that the attorneys' fees and expenses are to be limited, that is the clear assumption on which the order is made. It is therefore essential that all funds received by the attorney from the applicant and all funds held by the attorney on behalf of the applicant and all expenses incurred in connection with the application must be disclosed' (quoted in *Ex parte Snooke* 2014 (5) SA 426 (FB) 433).

- An allegation that it will be to the advantage of creditors if the debtor's estate is sequestrated, amplified by facts supporting the allegation (*Ex parte Alberts* 1937 OPD 2). The court will scrutinize this aspect of the application with particular care to protect the interests of creditors (*Ex parte Steenkamp and related cases* 1996 (3) SA 822 (W) 830). Yet a specific averment about advantage to creditors is probably unnecessary if the advantage is clearly apparent from the facts alleged in the application and the statement of affairs (*Ex parte Smith* 1958 (3) SA 568 (O)). If the applicant's only asset is his immovable property, and he argues that it will yield enough to yield a not negligible dividend to creditors, he must produce evidence of an expert (such as an estate agent) to establish what the property is likely to fetch on an

insolvency auction. The expert must state his opinion, the facts on which he relies, and the reasons on which his opinion is based (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke (supra)* 124; *Ex parte Mattysen et Uxor (First Rand*

Bank Ltd intervening) 2003 (2) SA 308 (T) 312; *Ex parte Bouwer and similar applications (supra)* 386–7; *Investec Bank Ltd & another v Mutemeri & another* 2010 (1) SA 265 (GSJ) 271; *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 155). His affidavit must confirm his personal inspection of the assets, specifying the date, time and place (*Ex parte Erasmus & another* 2015 (1) SA 540 (GP) 549).

- Details of any salary or income that the debtor is receiving (*Ex parte Watson* 1926 WLD 237). Surrender of an estate involves, among other things, a financial enquiry, and the applicant's current income is often an important factor in deciding whether the surrender would benefit creditors (*Ex parte Bouwer and similar applications (supra)* 385–6). In *Fesi & another v Absa Bank Ltd* 2000 (1) SA 499 (C) 502, the court dismissed as 'without merit' an argument that the applicants' salaries were not assets and did not have to be disclosed. In the court's view, the argument disregarded the 'good faith' expected of applicants in *ex parte* applications and the general rule on the content of affidavits in applications. The possibility that the debtor's income may exceed his expenses and thus go to paying the creditors is a highly relevant consideration, especially if the estate is small or the assets and liabilities differ little in value (*Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 (1) SA 49 (KZP) 57). In *Ex parte Veitch* 1965 (1) SA

667 (W), it was held that when a surplus of income is alleged to be the only advantage to creditors, the applicant should consent to some deduction being made from the excess by his trustee in terms of s 23(5) of the Act, to put the matter beyond doubt if and when the surrender is accepted (cf, though, *Ex parte Henning* 1981 (3) SA 843 (O) 848, where doubts were expressed about the effectiveness of such an undertaking). In *Ex parte Van Dyk* 2015 JDR 0667 (GP), the court refused to accept the debtor's offer of his earnings in this case, given the risks of policing the order, the delays in finishing the administration of the estate, and the constitutional challenges should the debtor later require the amount to meet his family's basic needs (*idem* para 23).

- Similarly, s 82(6) protects the debtor in preventing the sale of certain property in his estate. In some cases, he has been allowed to renounce this protection in his creditors' favour to prove the requirement of advantage to creditors (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* (*supra*) 125) but he should do so explicitly (*Ex parte Concato and similar cases* 2016 (3) SA 549 (WCC) 555–6). Yet this renunciation was also disallowed in another case because the protection is intended to benefit debtors, their families and the public, and so the protection cannot be waived (*Ex parte Kroese & another* 2015 (1) SA 405 (NWM), followed in *Ex parte Van Dyk* (*supra*) paras 19–20)).
- Any other information that may influence the court in granting or refusing the surrender. The applicant must be candid in his application and must disclose all material facts. The court has a discretion to refuse the surrender, even if all the statutory formalities have been complied with, and it may do this if the applicant has not acted in good faith or has not made a full and

frank disclosure (*Ex parte Hayes* 1970 (4) SA 94 (NC) 96; *Fesi & another v Absa Bank Ltd* (*supra*) 502). As the risk of abuse and of the creditors' interests being undermined is greater in applications for voluntary surrender than it is in applications for friendly sequestrations (on which, see 3.1.4), complete disclosure and sound evidence about the debtor's estate are even more important to enable the court to decide whether to accept the

surrender (*Ex parte Arntzen (Nedbank Ltd as intervening creditor)* (*supra*) 54). In *Arntzen* the court thus required compliance with the *Mthimkhulu* guidelines (listed in 3.1.4 on friendly sequestrations) that could be applied to applications for voluntary surrender. Documents available to support allegations should be provided. Admissible evidence supporting these applications should be required. All in all, the applicant should supply detailed evidence to satisfy a sceptical court that he has met the s 6 requirements and that the court's discretion should be exercised in his favour. See also *Ex parte Erasmus & another* 2015 (1) SA 540 (GP) 542–3; *Ex parte Concato and similar cases* (*supra*) 552–5; *Ex parte Gouws* 2013 JDR 1279 (GNP) para 7; *Nedbank Limited v Spencer* 2015 JDR 0503 (GP) para 7; *Ex parte: Steers* 2021 JDR 3053 (WCC) paras 8–9. In addition, in *Ex parte Bouwer and similar applications* (*supra*) 384–5, it was pointed out that the court is not simply 'a rubber stamp' in the application process. It has a discretion which must be exercised judicially, and to enable it to do this the applicant must be candid. The fact that the application is brought *ex parte* is reason enough for the applicant

to disclose all facts which may influence the court in reaching a decision.

- A description of the procedural steps followed by the applicant before bringing the application, supported by documents proving that each step has been taken: eg, tear sheets from the *Gazette* and newspaper, an affidavit by the applicant or his attorney giving details of notices sent, and a certificate by the Master and, where necessary, the magistrate, that the debtor's statement of affairs has lain for inspection. A general allegation that the provisions of the Insolvency Act have been complied with is not sufficient (*Ex parte Dickerson* 1939 OPD 6).
- The affidavit must be signed and sworn to before a commissioner of oaths who is independent of the office in which the affidavit was drawn. The debtor's attorney, therefore, may not attest the signing of the affidavit (*Papenfus v Transvaal Board for the Development of Peri-Urban Areas* 1969 (2) SA 66 (T)).

2.5.2 Filing of application at court

The notice of motion, founding affidavit(s) and annexures must be filed with the Registrar of the High Court before the date advertised in the notice of surrender.

2.5.3 Copy of application to 'consulting party'

If the debtor is an employer he must, at the time of making the application, provide a 'consulting party' contemplated in s 189 of the Labour Relations Act 66 of 1995 with a copy of the application (s 197B(2)). Section 189 (dealing with the dismissal of employees for reasons based on the employer's operational requirements) requires the employer to consult one of the following:

- the person whom the employer is required to consult in terms of a collective agreement;

- if there is no collective agreement that requires consultation, the workplace forum and registered trade union of the employees likely to be affected by the proposed dismissals;
- if there is no such workplace forum, the registered trade union whose members are likely to be affected by the proposed dismissals; or

- if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representative nominated for that purpose.

2.5.4 Master's report

In the Western Cape, a Master's report must be obtained and filed before the set-down of the application (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C); *Practice Note No 5, as amended* 2000 (4) SA 135 (C)).

2.5.5 Opposition to application

A creditor has the right to oppose the application even if his claim is less than the amount required to entitle him to apply for the compulsory sequestration of the debtor's estate (*Ex parte Berson; Levin and Kagan v Berson* 1938 WLD 107 112) and even if his claim is disputed by the debtor (*Ex parte Berman* 1972 (3) SA 128 (R)). The creditor must deliver one or more affidavits, before the date of the application, setting out the grounds of opposition. The debtor may then deliver replying affidavits.

2.5.6 Adjudication on application

On the date that the application is adjudicated upon, these documents must be before the court:

- The notice of motion and supporting affidavit(s).
- The debtor's statement of affairs, incorporating the verifying affidavit.
- Any sworn valuation necessary in the circumstances.
- Proof of publication of the notice of surrender in the *Gazette* and newspaper, eg, an affidavit by the debtor's attorney enclosing copies of the newspapers or the pages on which the notices appeared.
- Proof by affidavit that the applicant has delivered or posted copies of the notice of surrender as required.
- A certificate from the Master (and the magistrate too, if necessary) that the statement of affairs has lain for inspection as advertised, and whether any written objections have been lodged with him.
- Any report by the Master.
- Any opposing affidavits by creditors.
- The debtor's replying affidavit.

The established practice is for the debtor's counsel to appear in court and move for the acceptance of the surrender of the estate as insolvent. Opposing creditors may be represented by counsel when the court considers the application. The court may direct the applicant or any other person to appear and be examined before it (s 3(3)). Before the court can accept the surrender, it must be satisfied that the applicant has shown, on a balance of probabilities, that the requirements set out in s 6(1) of the Act (see 2.2) are satisfied (*Nieuwenhuizen & another v Nedcor Bank Ltd* [2001] 2 All SA 364 (O) 365).

Although the debtor is required to bring his application for surrender within 14 days after the advertised date of the hearing, the court is not bound to accept or decline the application within this period and so may postpone the application to a date beyond the period if it sees fit (*Ex parte Levin and Gohn; Ex parte Hyton* 1939 WLD 219).

Should the court accept the surrender, the debtor's estate is sequestrated, and the debtor becomes a declared insolvent as from the date of the court order. If the court refuses to accept the surrender, the debtor is restored to the position he was in before the publication of the notice of surrender (see 2.4.5 about the lapsing of the notice of surrender).

2.6 Court's discretion

Even if the court is satisfied that the requirements discussed above have been met and that the preliminary formalities have been observed, it still has a discretion to reject the surrender (s 6(1); *Ex parte Hayes* 1970 (4) SA 94 (NC) 96). These are examples of factors that may influence the court towards refusing the application:

- The debtor displayed gross extravagance and ran up debts on a pretentious scale, even after judgment had been granted against him (*Ex parte Logan* 1929 TPD 201 204).
- The debtor's creditors are not pressing him for payment and are willing to give him time or to accept payment in monthly instalments (*Ex parte Kruger* 1928 CPD 233).
- The debtor had an ulterior motive in applying for surrender, eg, to avoid paying or to defeat the rights of a particular creditor (*Ex parte Stirling; Landsberg v Stirling* (1922) 43 NPD 466; *Fesi & another v Absa Bank Ltd* 2000 (1) SA 499 (C)), or to prevent the sale in execution and transfer of his immovable property (cf *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 156), or had no intention of actually applying to court for the acceptance of the surrender, the notice of intention to surrender later lapsing when

no application follows (*Firststrand Bank Limited v Consumer Guardian Services (Pty) Limited & others* [2014] ZAWCHC 27 (4 March 2014) para 1).

- The debtor failed to give a full and frank account of his financial position (see 2.5.1).
- The debtor's papers were deficient in many respects (*Ex parte Harmse* 2005 (1) SA 323 (N) 332).
- The debtor's financial problems could be dealt with more appropriately under the National Credit Act 34 of 2005 (NCA). In *Ex parte Ford and two similar cases* 2009 (3) SA 376 (WCC), the court refused three applications for voluntary surrender on this ground. It appeared that the applicants' indebtedness related almost exclusively to 'credit agreements' as defined in the NCA and that there were good grounds for suspecting that the applicants had been granted 'reckless credit' as envisaged by s 86(7) of the NCA. The applicants had failed to explain adequately how they had come to be granted the credit and why they had not availed themselves of appropriate relief under the NCA. Binns-Ward AJ commented (*idem* 382–3):

'Insolvents whose misfortune arises out of credit-agreement transactions would be well advised, for the reasons that follow, to take into account the policy and objects of the NCA, and also the special remedies under that Act, before opting to apply for the surrender of their estates under the Insolvency Act, rather than availing of the provisions under the NCA. . . . The NCA provides a wide range of remedial relief which can be tailored to the justice of the particular case. The possibilities extend from disallowance of the recovery of the debt if it arises from reckless credit, to staying the accrual of interest thereon and ranking liability. . . . In view of the resistance by the applicants to assistance in terms of . . . the NCA in the context of these proceedings, I have determined not to refer their credit-agreement debts for

investigation and report by a debt counsellor. It is nevertheless open to them to take the necessary steps that appear to be indicated under the NCA on their own initiative. I am, however, not disposed to

exercise the court's discretion in favour of granting their applications for voluntary surrender, in the context of their failure to properly explain why their credit agreement related debt is not amenable to administration under the NCA to their own benefit as well as that of their credit-granting creditors who acted responsibly, as distinct from recklessly, in extending credit.'

Similarly, in *Ex parte Fuls and three similar matters* 2016 (6) SA 128 (GP) 130–1 the court held that the applicant seeking to convince the court that voluntary surrender would be to the advantage of creditors must state whether he had followed the NCA procedures for debt review and, if not, explain why he had not done so. He must also put up the debt counsellor's full report, explaining the procedures followed and the applicant's compliance with any debt restructuring arrangements. Without these disclosures, it would be hard to foresee how the applicant could convince the court that the creditors' interests would be better served by voluntary surrender rather than applying the NCA arrangements for debt review and debt rearrangement (see also *Ex parte: Steers* 2021 JDR 3053 (WCC) paras 10–11). The applicant, his legal representatives, and other people such as valuers can be called to appear before the court to explain unsatisfactory features of the application (s 3(3) of the Insolvency Act; *Ex parte Crafford* 2014 JDR 2521 (WCC))—perhaps an embarrassing experience, as the *Crafford* facts show. And exploring possible alternative relief under the NCA may prevent the devastating consequences of the debtor's wife and family being evicted from their home if a sequestration order is granted to the debtor. Their right to adequate housing under s 26 of the Constitution of the Republic of South Africa, 1996 ensured judicial oversight before the issuing of an eviction order, and 'basically has the effect that all possible alternatives have to be

considered before an eviction is ordered' (*Jordaan v Jordaan* 2020 JDR 0021 (FB) para 11).

2.7 Costs of surrender

The taxed costs incurred in surrendering the estate are included in the costs of sequestration and are payable out of the estate (s 97(3)). As a rule, costs occasioned by unsuccessful opposition to the application must be borne by the creditor(s) concerned (*Ex parte Bellairs* 1932 EDL 189), but the court may order these costs (or part of them) to be paid out of the estate (*Ex parte Berman* 1972 (3) SA 128 (R)). Attorneys' fees and expenses must be limited to the amounts stated in the application (cf *Ex parte Kelly* 2008 (4) SA 615 (T) 618–19).

2.8 Setting aside sequestration order

No appeal lies against an order refusing to accept the surrender of an estate, but anyone aggrieved by an order accepting the surrender may appeal against the order (s 150(1) and (5)). The noting of an appeal does not suspend the operation or execution of the relevant order, and the provisions of the Act continue to apply as if no appeal has been noted. Yet no property belonging to the sequestrated estate may be realized without the written consent of the insolvent (s 150(3)).

Section 149(2) empowers the court to 'rescind or vary' any order it made under the Act. This section cannot be relied on simply to obtain a rehearing of the merits of the sequestration application. The court may exercise its discretionary power to rescind or vary only if the application was clearly defective (eg, because the debtor's estate had

already been sequestered or was *prima facie* solvent), or if the procedure for rehabilitation would involve unnecessary hardship (*Ex parte Mavromati* 1948 (3) SA 886 (W) 890), or if there are other exceptional or unusual circumstances which make rescission or variation of the sequestration order necessary or desirable (*Storti v Nugent & others* 2001 (3) SA 783 (W) 806; *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 152). Unlike an order of rehabilitation, an order rescinding a sequestration order does not release the debtor from liability for his debts (see 19.3). He is simply placed in the position he occupied before the sequestration order was granted, as regards both his person and his property.

Section 149(2) does not empower the court to suspend the operation of its order. In *Mondi Limited v Rhodes* [1997] 3 All SA 291 (D), an insolvent sought an interdict under s 149(2) preventing the provisional trustee of his estate from exercising his powers and performing his duties, pending the confirmation or discharge of the rule *nisi* (the provisional order of court). It was held that although under the common law a court may grant an interdict suspending the operation of its order in certain circumstances (eg, where the order has been obtained fraudulently), s 149(2) confers no such power on the court. The power to 'vary' conferred by the section allows the court merely to alter the terms of the order, not effectively to deprive it of any force or effect. Meskin J explained (*idem* 295–6):

'There is . . . no necessity for the existence of the provision sought to be implied. If the provisional trustee is guilty of conduct which is inconsistent with his fiduciary position . . . the Master may give directions . . . for the purpose of preventing the continuation of such conduct and, in any event, the Master may summarily remove the provisional trustee from office [O]r the Court may be approached under the common law to effect such removal I have no doubt that at common law in such a case the Court could interdict such conduct by the provisional trustee pending the removal.'

Section 54(5) provides, among other things, that if, at any meeting of creditors convened for electing a trustee, no trustee is elected, the Master, or the insolvent with his consent, may apply to court to have the sequestration order set aside.

Chapter 3

Compulsory sequestration

Synopsis

- 3.1 Requirements
 - 3.1.1 Applicant entitled to apply in terms of s 9(1)
 - 3.1.2 Debtor committed act of insolvency or is insolvent
 - 3.1.3 Reason to believe sequestration will be to advantage of creditors
 - 3.1.4 'Friendly' sequestration
- 3.2 Application for sequestration
 - 3.2.1 Form and content of application
 - 3.2.2 Steps prior to adjudication on application
 - 3.2.3 Provisional sequestration
 - 3.2.4 Service of rule *nisi*
 - 3.2.5 Opposition to application
 - 3.2.6 Anticipation of return day
 - 3.2.7 Intervention by another creditor
 - 3.2.8 Final sequestration
- 3.3 Court's discretion
- 3.4 Costs of proceedings
- 3.5 Unwarranted or vexatious proceedings
- 3.6 Setting aside sequestration order

The second way in which a debtor's estate may be sequestrated is called compulsory sequestration. While an application for voluntary surrender is made by the debtor himself, an application for compulsory sequestration is made by one or more creditors.

3.1 Requirements

The court may grant an application for the sequestration of a debtor's estate if it is satisfied that:

- the applicant has established a claim which entitles him, under s 9(1), to apply for sequestration of the debtor's estate;
- the debtor has committed an act of insolvency or is insolvent; and
- there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated (s 12(1)).

The onus of satisfying the court on these three matters rests throughout on the sequestrating creditor. The debtor has no onus to disprove any element (*Braithwaite v Gilbert (Volkskas Bpk intervening)* 1984 (4) SA 717 (W) 718).

The applicant, when delivering the notice of motion, must serve on each respondent a notice indicating his agreement or opposition to the referral of the

dispute to mediation (Rule 41A(2)(a) of the Uniform Rules of Court and Form 27: see GNR.107 *Government Gazette* 43000 of 7 February 2020, with effect from 9 March 2020). In this voluntary process, an independent mediator facilitates discussions between the parties and helps them to negotiate to resolve their dispute. He helps them to identify issues for agreement, explore areas of compromise, generate options for resolving the dispute, or clarify priorities (Rule 41A(1) 'mediation'). The respondents must also serve notice on the applicant of their agreement or opposition to the referral of the dispute to mediation (Rule 41A(2)(b)). At any stage before judgment, the parties may agree, or the court may order, that the dispute should be referred to mediation (Rule 41A(3)). If there are multiple

parties to a dispute, some parties may agree to mediation despite others' refusal (Rule 41A(5)(a)). Discussions in applications for compulsory sequestration might involve issues such as compliance with the formalities and the proof of advantage to creditors (see Kunst, Borraine and Burdette *Meskin's Insolvency Law* (electronic version) para 2.1).

3.1.1 Applicant entitled to apply in terms of s 9(1)

Section 9(1) allows proceedings for the compulsory sequestration of a debtor's estate to be instituted by:

- a creditor (or his agent) who has a liquidated claim against the debtor for not less than R100, or
- two or more creditors (or their agents) who have liquidated claims against the debtor amounting, in aggregate, to not less than R200.

The fact that a creditor holds security for his claim does not debar him from applying, even if the value of the security exceeds the amount of the claim (*R v Hohls* 1959 (2) SA 656 (N)). If an agent applies on behalf of the creditor, he must be authorized to do so before bringing the application. An applicant's lack of authority cannot be cured by ratification once the application has been launched (*South African Milling Co (Pty) Ltd v Reddy* 1980 (3) SA 431 (SE)).

A 'liquidated claim' is a monetary claim—a claim for the transfer of property, for instance, does not give *locus standi* to apply (*Friedberg v Van Niekerk* 1962 (2) SA 413 (C))—the amount of which is fixed by agreement, judgment or otherwise (*Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A)). Examples of liquidated claims are a claim for the price of goods sold and delivered (*Kathrada Bros v Asmal* (1919) 40 NPD 199), a claim based on a provisional sentence judgment (*Meskin v Amod* 1956 (3) SA 120 (N)), a claim for the return of the price paid under a sale which

has been cancelled because of the seller's repudiation (*Bagatla Ba Makau Tribe & others v Van Cittert* 1929 TPD 210), a delictual claim for the theft of a fixed and determinable sum of money (*Premier Western Cape & others v Parker & Mohammed & others* [1999] 1 All SA 176 (C); cf *Lindhaven Meat Market CC v Reyneke* 2001 (1) SA 454 (W)), the market value of shares traded on a stock exchange (*Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) 344–5), and a claim for unjustified enrichment (*Oro Africa (Pty) Limited v Currin* 2016 JDR 0380 (WCC) 24–5). Examples of claims that are unliquidated are a claim for damages for the failure to carry out obligations under a consent paper (*Ex parte Bruce* 1956 (1) SA 480 (SR)) and a claim for the payment of an untaxed attorney and client bill of

costs (*Simpson & Liesching v Van Breda* 1930 CPD 195). If a debt is disputed, it cannot be regarded as liquidated unless it is capable of speedy and easy proof (*Ex parte Berson; Levin and Kagan v Berson* 1938 WLD 107 115–16; cf *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) 116). And a disposition that might be impeached under ss 26, 29 or 30 of the Insolvency Act is not a debt for the purposes of an application for sequestration, before the disposition has been declared to be set aside and recoverable under s 32(3) (*Exotic Fruit Company (Pty) Ltd v Zakharov* 2021 JDR 1653 (WCC) paras 8–13).

The creditor must also have *locus standi* to appear in the High Court. A senior official of the South African Revenue Service may authorize bringing sequestration proceedings for an outstanding tax debt (s 177(1) of the Tax Administration Act 28 of 2011), and the Registrar of Banks may authorize bringing sequestration proceedings against a person carrying on the business of a bank without being

registered as one (*Registrar of Banks v Smit* 2013 JDR 0718 (GNP) paras 11–12).

Section 9(2) provides that a liquidated claim 'which has accrued but which is not yet due' by the time the application is heard must be regarded as liquidated for these purposes. It follows that an agreement to give credit, or allow time in which to pay, is not a bar to sequestration proceedings. But if the creditor has agreed that he will not institute proceedings to recover the claim, or that he will refrain from suing for a definite period or until the occurrence of a specified event, then he is precluded from applying for sequestration while the agreement still applies (cf *Schneider NO v Raikin* 1955 (1) SA 19 (W) 21–2). A contractual claim cannot be considered to have 'accrued' for the purposes of s 9(2) until the creditor has performed any reciprocal duty resting on him. So in *Sanddune CC v Catt* 1998 (2) SA 461 (SE), it was held that a claim for rent cannot be relied upon until the lessor has made the leased premises available to the lessee for the relevant period. Nepgen J observed (*idem* 465):

'The position is quite different from that which exists in respect of a sale for credit or a loan of money which is only repayable at some future date, for in both those instances the seller and the money lender will have performed their obligations in terms of the respective agreements and the liability to pay of the purchaser and the borrower would be certain [I]n the case of a lease agreement both the lessor and lessee have future obligations, and the lessee's obligation to pay future rentals is [dependent] upon the lessor making the leased premises available to him. For these reasons . . . the applicant does not have a claim . . . "which has accrued", in the sense in which the phrase is used in s 9(2) of the Act.'

The applicant must have a liquidated claim of not less than R100, both when he applies for a provisional order of sequestration and when he asks for the order to be made final (as to which, see 3.2.3 and 3.2.8). After the debtor's estate has been provisionally sequestrated, the debtor himself cannot make a payment to the sequestrating creditor so as to extinguish the latter's claim or reduce it

below R100 (*Venter v Van Graan* 1929 TPD 435). But a third person, such as a surety, may pay on the debtor's behalf, and if the payment extinguishes the claim or reduces it to less than R100, the provisional order must be discharged (*Johannesburg Livestock Co v Herr* 1921 WLD 121). A creditor is not entitled to refuse payment in full (but may reject part payment) by a third person (*Reliance Agencies (Pty) Ltd v Patel* 1946 CPD 463; *Paizes v Phitides* 1940 WLD 189). If the sequestrating creditor's *locus standi* is eliminated by a payment, another creditor may intervene and apply for a further provisional order of sequestration to be granted on the discharge of the first order (*Reliance Agencies (Pty) Ltd v Patel* (*supra*)).

3.1.2 Debtor committed act of insolvency or is insolvent

(i) Acts of insolvency

Although a creditor may have a good reason for believing that the debtor is insolvent, he will seldom be able to prove that the debtor's liabilities exceed his assets. So the legislature has designated certain acts or omissions by a debtor as 'acts of insolvency', and if the creditor can establish that the debtor has committed one or more of these 'acts', he may seek an order sequestrating the debtor's estate without having to prove that the debtor is actually insolvent (*De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) 676). An act of insolvency is a distinct and separate cause of action from actual insolvency (*ABSA Bank Limited v Appelcryn* [2022] ZAGPJHC 429 (28 June 2022) para 15). It follows that a debtor's estate may be sequestrated even though he is technically solvent (*DP du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T)).

1335). The creditor may rely on an act of insolvency committed after the commencement of sequestration proceedings, provided the necessary allegations are properly before the court (*Joosub v Soomar* 1930 TPD 773 779; *Hassan & another v Berrange* NO 2012 (6) SA 329 (SCA) 347).

An act of insolvency need not be committed against the sequestrating creditor. Section 9(1) gives *any* creditor of the debtor the right to apply for sequestration once the debtor commits an act of insolvency, whether or not the debtor directed the act at the creditor concerned or intended it to have any bearing on that creditor's affairs (*Beira v Raphaely-Weiner & others* 1997 (4) SA 332 (SCA) 338).

An act of insolvency committed by a spouse who is married in community of property operates as an act of insolvency by both spouses, so is a good ground for sequestrating the joint estate (*Standard Bank of SA Ltd v Sewpersadh & another* 2005 (4) SA 148 (C) 152–3) and for sequestrating the separate estate of the other spouse after divorce dissolves the marriage (*BP Southern Africa (Pty) Ltd v Viljoen en 'n ander* 2002 (5) SA 630 (O) 638–9).

An act of insolvency may be proved and relied upon even though it is contained in a communication that would ordinarily be privileged from disclosure, such as an offer marked 'without prejudice' sent in a genuine attempt to reach a compromise about a disputed debt (*Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N) 67). In *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W), Van Schalkwyk J explained the policy of the law in this regard (1092–3):

'A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect

from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.'

Given the public interest in insolvency proceedings, public policy requires admissions of insolvency not to be prevented even on privileged occasions (*Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) 219).

The conduct designated as acts of insolvency will now be considered.

Page 45

(a) Absence from Republic or dwelling

If he leaves the Republic or, being out of the Republic, remains absent from it, or departs from his dwelling or otherwise absents himself, with intent by doing so to evade or delay payment of his debts (s 8(a)).

The creditor must establish the debtor's intention to evade or delay payment of his debts (*Estate Salzmann v Van Rooyen* 1944 OPD 1); in particular, that the only probable inference to be drawn is that the debtor had this intention (*Berrange NO v Hassan & another* 2009 (2) SA 339 (N) 365). So, for example, in *JM Busha Investment Group (Pty) Ltd v Huxley* [2022] ZAGPJHC 439 (1 July 2022), the respondent and his wife had skipped bail and fled back to Malawi. He did not supply any information about his finances or prove his solvency, and it was safe to conclude that he was insolvent, had left South Africa with the sole purpose of evading his creditors, and did not intend returning voluntarily because he was a fugitive from justice. The test of his intention is subjective (*Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) 345). Proof of departure or absence, by itself, is not sufficient, because a person may leave or absent himself for reasons completely unconnected with the payment or non-payment of debts,

eg, to avoid a deterioration in his health or to join a close relative (*Bishop v Baker* 1962 (2) SA 679 (D)), or simply on account of his occupation (*Abell v Strauss* 1973 (2) SA 611 (W)—the debtor, a taxi driver, was called away often and at irregular times). A factor from which the intention to evade or delay payment may be inferred is that the debtor made an appointment to make a payment and then left without keeping it (*Rabbich v Miller* (1885) 6 NLR 167). In *Estate Salzmann v Van Rooyen* (*supra*), the debtor, a company director, left for another town—Cape Town—ostensibly to visit his wife, who had fallen ill there. Before leaving, though, he appointed someone as co-director to run the company business, disposed of his office equipment, and terminated the lease of the premises where he had been residing. He gave no address at which he could be contacted in Cape Town and, immediately on arriving there, resigned from his position as director. From then onwards, he ignored letters relating to business matters addressed to him. The court held that the inference was irresistible that the debtor intended to evade payment. By contrast, unfounded rumour is a feeble basis for relying on this act of insolvency (*Savage & Sons v Flowers* (1904) EDC 45 49).

(b) Failure to satisfy judgment

If a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute the judgment, to satisfy it or to indicate to the officer disposable property sufficient to satisfy it, or if it appears from the return made by the officer that he has not found sufficient disposable property to satisfy the judgment (s 8(b)).

Section 43 of the Superior Courts Act 10 of 2013 provides for the sheriff's execution of process. Subject to the applicable rules, he must execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and

processes of any Superior Court directed to him, and make return of the manner of execution thereof to the court and to the party at whose instance they were issued (s 43(1)). His return of what has been done upon any process of a court is *prima facie* evidence of the matters stated in the return (s 43(2)). From this summary of the execution of civil process the discussion moves to the act of insolvency that consists of the failure to satisfy a judgment.

Page 46

Section 8(b) of the Insolvency Act creates two separate acts of insolvency: one, where the debtor, upon demand by the sheriff, fails to satisfy the judgment or to indicate disposable property sufficient to satisfy it; and the other, where the sheriff, without presenting the writ to the debtor, fails to find sufficient disposable property to satisfy the judgment and states this fact in his return. The two acts, although separate, are not independent of each other: the second act applies only if the first cannot be established, ie, only if the writ of execution cannot be served personally on the debtor. If the sheriff, on serving the writ, neglects to demand satisfaction of the writ by the debtor and after that he simply states in his return that he was unable to find sufficient disposable property, no act of insolvency is committed (*Nedbank Ltd v Norton* 1987 (3) SA 619 (N); cf also *Moodley v Hedley* 1963 (3) SA 453 (N)). And if the debtor fails on demand to satisfy the judgment or indicate sufficient disposable property, it is irrelevant whether or not the sheriff later finds disposable property sufficient to satisfy the judgment (*Dicks v Marais* 1952 (3) SA 165 (N)).

'Judgment' includes a provisional sentence judgment, even if the defendant has entered an appearance to defend the principal case (*Meskin v Amod* 1956 (3) SA 120 (N)). The judgment must be against the debtor in his own name and not, for example, in the name of a firm of which he is

the sole proprietor (*Stocks & Stocks Industrial Holdings (Pty) Ltd & another v Roberts t/a Premier Timber & Trading* [1998] 4 All SA 231 (SE) 233–4). But the judgment does not have to be one obtained by the sequestrating creditor. A creditor may seek the sequestration of a debtor's estate on the basis of a *nulla bona* return (a return stating that there are no goods on which to execute) on a writ issued at the instance of another creditor (*Beira v Raphaely-Weiner & others* 1997 (4) SA 332 (SCA) 338), provided the other creditor has not been paid in the meantime (*Duchen v Flax* 1938 WLD 119 125) or agreed to accept payment of the judgment debt in instalments (*Abell v Strauss* 1973 (2) SA 611 (W) 612). Whether the term 'court' includes the small claims court is unclear (cf s 2).

The demand to satisfy the judgment debt must be made of the debtor or his duly authorized agent (in other words, personal service is required): a demand made to some other party, such as the debtor's wife, does not suffice (*Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 137 (O) 138). The writ need not be served on the debtor at his residence or place of business: s 8(b) requires only personal service and does not say *where* the service must take place (*Beira v Raphaely-Weiner & others* (*supra*) 338). To 'indicate' property, the debtor should tell the sheriff what the property is and where it is with enough particularity to demonstrate its sufficiency and enable the sheriff to attach and sell it (*Nathan & Co v Sheonandan* 1963 (1) SA 179 (N) 181–2; *Wilken & others NNO v Reichenberg* 1999 (1) SA 852 (W) 858). So, for example, a debtor does not indicate immovable property for these purposes if he merely states that he has property at another address or in a particular area or street (*Wilken & others NNO v Reichenberg* (*supra*)).

The term 'disposable property' means any property which may be attached and sold in execution, even if it is situated

in some other locality (*Laver v Olivier* 1953 (2) SA 437 (T)). It includes both movable and immovable property, and also incorporeal assets, such as book debts (*Mostert NO v Von Hirschberg* 1961 (1) SA 146 (O)). It does not include immovable property which has been mortgaged, even, it seems, where the value of the property considerably exceeds the amount owing

under the mortgage bond (*Tewari v Secura Investments* 1960 (3) SA 432 (N)). But if the applicant himself is the first mortgagee of the immovable property, it is considered disposable (*Western Bank Ltd v Els* 1976 (2) SA 797 (T)).

If the sheriff's return of service merely refers to movable property, it does not establish an act of insolvency (*Amalgamated Hardware & Timber (Pty) Ltd v Wimmers* 1964 (2) SA 542 (T) 544). To avail as an act of insolvency, the return should refer to all disposable property of whatever description (*Saber Motors (Pty) Ltd v Morophane* 1961 (1) SA 759 (W)). It has been held that the expression 'money, property or assets' in the printed form commonly in use covers all disposable property (*Amalgamated Hardware & Timber (Pty) Ltd v Wimmers (supra)* 544). Vieyra J remarked (*ibid*):

'Without special leave of Court, no writ can be issued against immovable property until a *nulla bona* return has been made on a writ against movables [But] there is no reason why, after having made enquiries in regard to movables, with the result indicated in the return, the [Sheriff] should not also make the further enquiry whether the debtor is possessed of immovable property capable of attachment. On then receiving an answer in the negative, this could be incorporated in the return, thus establishing, in appropriate cases, an act of insolvency'

If the debtor points out insufficient disposable property to satisfy the writ, the sheriff may refuse to attach it and make a return of *nulla bona*, in which event the creditor may apply for sequestration (*Kent v Transvaalsche Bank* 1907

TS 765). The onus is then on the sequestrating creditor to establish that the property pointed out was insufficient to satisfy the judgment (*Premier Finance Corporation (Pty) Ltd v B Grillanda, trading as Auto Sales Centre* 1972 (1) SA 347 (D)). If the sheriff attaches the property pointed out by the debtor and, at the sale in execution, the property does not realize enough to satisfy the judgment, the creditor may proceed to sequestration on the ground that the debtor has not indicated property sufficient to satisfy the judgment (*Paizes v Phitides* 1940 WLD 189).

To prove that the requirements of the subsection have been satisfied, the sequestrating creditor may rely solely on the sheriff's return of service, which is considered *prima facie* proof of the truth of its contents. The debtor may, of course, dispute the correctness of the statements in the return, but if the return, on the face of it, establishes an act of insolvency, the onus is on the debtor to show by the clearest and most satisfactory evidence that the facts set out in the return are incorrect (*Van Vuuren v Jansen* 1977 (3) SA 1062 (T)). In *Van Vuuren*, the debtor alleged that the sheriff's return was incorrect because it did not refer to the debtor's personal assets (the value of which, according to the debtor, well exceeded the judgment). The debtor said that, when demanding payment and asking for assets to satisfy the judgment, the sheriff had referred only to the assets of 'Le Mans Auto Sales' (the debtor's business) and had not asked the debtor to disclose his personal assets. There was no mention of the debtor's business in the writ, and the sheriff denied that he had specifically mentioned it when serving the writ. The court held that the probabilities were against the debtor and that his allegation was insufficient to rebut the *prima facie* inference that the return was correct.

Service effected by the sheriff must be proved by his return of service (see Rule 4(6)(a) of the Uniform Rules of

Court; s 43(2) of the Superior Courts Act 10 of 2013, mentioned above). The return relied on by the sequestrating creditor must

obviously be made by the officer who actually executed the judgment, and not by someone else. In *De Wet v Le Riche* 2000 (3) SA 1118 (T), the *nulla bona* return before the court had been certified and signed by a sheriff who had not executed the judgment. The court ruled that the applicant could not rely on the return as proof of an act of insolvency. It was held that a legal practitioner who draws up or settles an application for compulsory sequestration based on a *nulla bona* return should carefully scrutinize the return and, if it is defective or inadequate, should remit it to the officer concerned for rectification before initiating the application to court.

(c) Disposition prejudicing creditors or preferring one creditor

If he makes, or attempts to make, any disposition of any of his property which has, or would have, the effect of prejudicing his creditors or of preferring one creditor above another (s 8(c)).

This subsection envisages two sets of circumstances: an actual disposition of property and an attempted disposition of property. If there is an actual disposition, it must have the effect of prejudicing the debtor's creditors or preferring one creditor above another. If there is an attempted disposition, it must be such that it would, *if completed*, have the same effect. The word 'disposition' is wide enough to include both a contract in which the debtor undertakes to dispose of property and the actual subsequent delivery of the property (*Nahrungsmittel GmbH v Otto* 1991 (4) SA 414

(C)). For further explanation of the concept of 'disposition', see 12.1.

Only the *effect* of the disposition need be considered. It does not matter whether the debtor made the disposition deliberately to favour one of his creditors, or recklessly without regard for its consequences: the debtor's state of mind in making the disposition is irrelevant (*De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) 675). A debtor commits this act of insolvency when, for example, he refuses to meet one debt whilst paying another in full, or sells an asset manifestly below its market value whilst failing to meet debts that have fallen due (*idem* 677; *Estate de Jager v Van Niekerk* 1918 GWL 73), or passes a mortgage bond over his immovable property to secure his indebtedness to one creditor whilst his business ventures are in financial difficulties and he is not paying creditors (*Fittinghoff & others v Rollins; Fittinghoff & others v Stockton* 1997 (1) SA 535 (W)). In *De Villiers's* case (*supra*), it was argued that a payment to a single creditor was preferential to that creditor and prejudicial to the remaining creditors because if all the debtor's liabilities, whether due or not, had been made payable then, they would have exceeded the debtor's assets. The court rejected the argument. It held that an act of insolvency under s 8(c) is committed only where there is an actual preference of one creditor above another when more than one debt has fallen due. As the debtor had not failed to pay any debt when due, he had not committed an act of insolvency. The legislature primarily contemplated the sort of disposition 'that by its very character, seen in isolation, was likely to have the postulated effect' (*Ullman Sails (Pty) Ltd & others v Jannie Reuvers Sails (Pty) Ltd & others and related matters* [2022] 3 All SA 290 (WCC) 305). One example would be the debtor's disposing, outside the ordinary course of business, of movable property which was

subject to a general notarial bond—conduct probably prejudicing the bondholder.

It is not sufficient for the applicant to state baldly that the disposition in question has had the effect of prejudicing creditors: he must explain *how* it has had this

effect. But an explanation is apparently not required if the disposition, on the face of it, is such that a reasonable person would infer that it is prejudicial to creditors (*Mindel Bros and Mindel v Selikman* 1930 WLD 242 245). Proof that a disposition rendered the debtor's estate insolvent (or more insolvent) indicates prejudice to creditors (*Standard Bank of South Africa v Sappeur-Fleury* 1925 SWA 7), but the applicant need not establish insolvency in every case. In *Nahrungsmittel GmbH v Otto (supra)*, a disposition which left the debtor solvent, but so illiquid that he could not pay all his debts, was held to be prejudicial to creditors. The court held that in each case regard should be had to all the surrounding circumstances to ascertain whether there is prejudice.

(d) Removal of property with intent to prejudice or prefer
If he removes, or attempts to remove, any of his property with intent to prejudice his creditors or to prefer one creditor above another (s 8(d)).

This act of insolvency differs from the preceding one in two respects: a disposition of property is not required—mere removal being sufficient—and the intention of the debtor, not the effect of what he does, is important. The test for determining whether the debtor had the requisite intention is subjective (*De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) 676; *Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) 345). The intention may be inferred

from the circumstances surrounding the removal. An example of a removal with intent to prejudice creditors is the sending of money or goods to a foreign country so that they are not available to settle creditors' claims (cf *Berrange NO v Hassan & another* 2009 (2) SA 339 (N) 367–8).

(e) Offer of arrangement

If he makes, or offers to make, any arrangement with any of his creditors for releasing him wholly or in part from his debts (s 8(e)).

An arrangement or an offer qualifies as an act of insolvency under this subsection only if it indicates the debtor's inability to pay his debts (*Laeveldse Koöperasie Bpk v Joubert* 1980 (3) SA 1117 (T)). This criterion was clearly satisfied in *Joosub v Soomar* 1930 TPD 773, where the debtor offered to pay his creditors 50 cents in the rand and intimated that if the offer was not accepted, he would consider surrendering his estate. If the debtor offers by way of settlement a lesser amount than that claimed and denies liability altogether or disputes the amount of the debt, he does not commit an act of insolvency, because it does not appear from his offer that he cannot pay the debt. On the other hand, if he offers a lesser sum in settlement and expressly or by implication admits that he owes the full debt, he commits an act of insolvency, because he tacitly acknowledges that he cannot pay the debt (*Laeveldse Koöperasie Bpk v Joubert (supra)*).

The debtor need not make the arrangement or offer personally: one made by a third person with his knowledge and permission suffices (*ibid*).

The object of the arrangement or offer must be to *release* the debtor from liability, wholly or in part. An offer of a certain amount in the rand, subject to the debtor's being allowed an extension of time to pay the balance, does not

amount to an act of insolvency (*Mackay v Cahill* 1962 (4) SA 193 (O) 206).

(f) Failure to apply for surrender

If, after publishing a notice of surrender of his estate which has not lapsed or been withdrawn in terms of ss 6 or 7, he fails to comply with the requirements of s 4(3), or lodges, in terms of s 4(3), a statement which is incorrect or incomplete in any material respect, or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the notice of surrender as the date on which the application is to be made (s 8(f)).

Three acts of insolvency are embodied in this subsection. In each case, the debtor must have published a notice of surrender which has not lapsed (see 2.4.5) or been withdrawn, and then he must have done one of the following:

- failed to lodge a statement of affairs with the Master;
- filed a statement of affairs which is incorrect or incomplete in a material respect; or
- failed to apply for the acceptance of the surrender on the specified date.

A material error or omission is one which may affect the minds of creditors in deciding whether to oppose the application for surrender, eg, the omission of a claim not of a trifling nature (*Ex parte Berson; Levin and Kagan v Berson* 1938 WLD 107).

(g) Notice of inability to pay

If he gives notice in writing to any one of his creditors that he is unable to pay any of his debts (s 8(g)).

The notice must be in writing: the debtor does not commit this act of insolvency by informing the creditor orally that he cannot pay his debts, although he does provide the creditor with evidence of actual insolvency (*Patel v Sunday* 1936 CPD 466 469).

The words 'any of his debts' are capable of being interpreted as meaning either 'any one of his debts' or 'all of his debts', but the courts, following the Afrikaans version of s 8(g)—'een of ander van sy skulde'—have adopted the former construction (because the Afrikaans version of the Insolvency Act is the signed and thus the official version of the Act). So the debtor commits an act of insolvency if he gives notice of his inability to pay *any single* debt (*Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D) 32–3; *Court v Standard Bank of SA Ltd; Court v Bester NO & others* 1995 (3) SA 123 (A) 133). A typical example of this act of insolvency occurs when a debtor (or his attorney) writes to a creditor informing him that he is unable to pay the debt for the time being and offering to pay it in instalments (*Goldblatt's Wholesale (Pty) Ltd v Damalis* 1953 (3) SA 730 (O) 732).

It is usually said that the debtor must have intended to give notice of his inability to pay (see, eg, *Barlows (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E) 390). The court has regard, not so much to the debtor's subjective intention, but to whether a reasonable person in the position of the receiver and knowing about the relevant circumstances would have interpreted the document in question to mean that the debtor cannot pay his debts (*Court v Standard Bank of SA Ltd; Court v Bester NO & others (supra)* 134). The 'relevant circumstances' are those existing when the letter is received. The question is not how a reasonable person would have understood the letter in the light of events which occurred or knowledge which was obtained later. The proper approach is to consider how the

letter would be understood by a reasonable person in the position of the creditor when he receives it,

considering that creditor's knowledge of the debtor's circumstances (*O'Shea NO v Van Zyl & others NNO* 2012 (1) SA 90 (SCA) 98).

A debtor who applies for an administration order under s 74 of the Magistrates' Courts Act 32 of 1944 is required to state that he cannot pay any of his debts and so may commit an act of insolvency in the process (*Volkskas Bank ('n Divisie van Absa Bank Bpk) v Pietersen* 1993 (1) SA 312 (C) 316). But the application must be construed according to its tenor as a whole and not according to the meaning in isolation of certain words used in it (*Shaban & Co (Pty) Ltd v Plank* 1966 (1) SA 59 (O) 63). If it appears from other information provided in the application that the debtor did not intend the word 'unable' to be taken literally—for instance, if he clearly has sufficient means to pay his debts and is simply *unwilling to do so immediately*—then he does not commit an act of insolvency. This was the position in *Shaban & Co (Pty) Ltd v Plank (supra)* 63 and *Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 137 (O) 139–40. In *Shaban*, the debtor's application for administration showed a considerable excess of assets over his liabilities. The court held that the debtor's statement, 'I am unable to liquidate my liabilities forthwith' (*idem* 61), was obviously not intended to be taken literally because his assets consisted largely of stock-in-trade and loose items for which a ready market existed. What he probably intended to convey was that, although he could, if forced to do so, liquidate enough of his assets to pay his creditors in the ordinary course of business, he was unwilling to do this as it would result in a fairly good business being liquidated. In *Rodrew*, although the debtor stated categorically that 'I am a debtor and am

not in a position to pay my debts' ('Ek is 'n skuldenaar en is nie in staat om my skulde te betaal nie' (*idem* 139)), it appeared clearly from the rest of his affidavit and other annexures that he considered himself solvent and intended making contractual arrangements with all his creditors to pay them in full by way of monthly instalments.

Previously, it used to be unclear whether a debtor who relied on the debt review provisions of the National Credit Act 34 of 2005 was also committing an act of insolvency. In *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) 602–5, the court held that where a debtor wrote to his creditor informing him that he had applied for or been placed under debt review under the National Credit Act, he was necessarily informing the creditor that he was over-indebted and unable to pay his debts, and this constituted an act of insolvency under s 8(g) of the Insolvency Act. In *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP) 195, however, it was held that the fact that a debtor applied for debt review under the National Credit Act did not, in itself, amount to an act of insolvency under s 8(g) of the Insolvency Act because the application did not involve any notice given by the debtor to the creditor in which the debtor declared an inability to pay one or more of his debts. The issue has now been settled by s 8A of the Insolvency Act (with effect from 13 March 2015): a debtor who has applied for debt review must not be regarded as having committed an act of insolvency.

(h) Inability to pay debts after notice of transfer of business

If, being a trader, he gives notice in the *Gazette* in terms of s 34(1) [of his intention to transfer his business] and is thereafter unable to pay all his debts (s 8(h)).

Section 34(2) provides that, as soon as a notice is published under s 34(1), every liquidated liability of the trader in connection with his business which would become

due at some future date falls due forthwith, if the creditor concerned demands payment. The term 'debts' in s 8(h) includes debts which become immediately payable by reason of this subsection.

Proof of inability to pay one debt may be accepted as proof that the debtor is unable to pay all his debts, but evidence that the debtor was unwilling or has refused to pay a particular debt is not enough to establish this act of insolvency (*SA Spice Works (Pty) Ltd v Spies* 1957 (1) SA 679 (T)).

(ii) Debtor in fact insolvent

Instead of (or in addition to) relying on an act of insolvency by the debtor, the sequestrating creditor may rely on the fact that the debtor's estate is insolvent, ie, that his liabilities exceed his assets. If the creditor relies on an act of insolvency and cannot establish that it was committed, but it is clear that the debtor is in fact insolvent, the court may grant a final sequestration order on the latter ground (*Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T)).

Factual insolvency may be established directly, by evidence of the debtor's liabilities and the market value of his assets, or indirectly, by evidence of facts and circumstances from which the inference of insolvency is fairly and properly deducible (*Absa Bank Ltd v Rhebokskloof (Pty) Ltd & others* 1993 (4) SA 436 (C) 443; *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W) 443), eg, that the debtor has failed to pay his debts and admitted that he is insolvent (*Hugo NO v*

Lipkie 1961 (3) SA 66 (O) 67–8). Immovable property is valued not at its forced-sale value but at its open-market value, which is the usual way of determining value (*Investec Bank Ltd v Lambrechts NO & others* 2019 (5) SA 179 (WCC) 186). In *Patel v Sondag* 1936 CPD 466, two default judgments had been taken against the debtor and a writ issued in respect of one of them had not been satisfied. Besides, the debtor had approached some of his creditors—those who knew him well—and requested them to take part in a distribution scheme. The court held that these facts raised a very strong *prima facie* view that the debtor was insolvent, and this view was confirmed by the statement of affairs given by the debtor in his replying affidavit.

Insolvency cannot be inferred simply from the fact that the debtor has not paid his debts or has requested time to pay (*Corner Shop (Pty) Ltd v Moodley (supra)* 60) or has offered to pay a certain amount in the rand immediately and the balance later (*Meyer & Kie v Maree* 1967 (3) SA 27 (T) 31).

3.1.3 Reason to believe sequestration will be to advantage of creditors

Before the court can grant a final order of sequestration, it must be satisfied that there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated (s 12(1)(c)). 'Creditors' means all the creditors, or at least the general body of creditors (*Lotzof v Raubenheimer* 1959 (1) SA 90 (O) 94). The question is whether a 'substantial portion' of the total of the creditors, determined according to the value of the claims, will derive advantage from sequestration (*Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111; *Fesi & another v Absa Bank Ltd* 2000 (1) SA 499 (C) 505; *Body Corporate of Empire Gardens v Sithole & another* 2017 (4) SA 161 (SCA) 164–5).

'The meaning of the term "advantage" is broad and should not be rigidified' (*Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC) 19). The

advantage may lie in a dividend for creditors; an inquiry into the debtor's finances to find impeachable dispositions; or the trustee's control of the estate to prevent the debtor's wastage or concealment of assets.

For sequestration to be to the advantage of creditors, it must 'yield at the least, a not negligible dividend' (*per* Selke J in *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* (*supra*) 111; *Ex parte Bouwer and similar applications* 2009 (6) SA 382 (GNP) 386). If, after the costs of sequestration have been met, there is no payment to creditors, or only a negligible one, there is no advantage (*London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) 591; *Ex parte Steenkamp and related cases* 1996 (3) SA 822 (W)). Previously, the decisions on what constitutes a sufficient or non-negligible dividend were not harmonious. In *Absa Bank Ltd v De Klerk and related cases* 1999 (4) SA 835 (E) 840, a dividend of five cents in the rand was regarded as sufficient, but in *Esterhuizen v Swanepoel and sixteen other cases* 2004 (4) SA 89 (W) 102, a dividend of ten cents was considered insufficient, and in *Ex parte Ogunlaja & others* [2011] JOL 2709 (GNP) para 9, it was held that for voluntary surrender and compulsory sequestration in the North Gauteng High Court, Pretoria, the dividend must be at least 20 cents in the rand (applied as recently as *Boast v Nedbank Limited & another* 2022 JDR 0788 (GP) para 32, an application for voluntary surrender). And in *Courier-IT SA (Pty) Ltd v Van Staden & another* 2022 JDR 0464 (GJ) paras 41–4, the court explained that the Gauteng practice direction requiring the calculation of the expected dividend was restricted to friendly sequestrations (see 3.1.4 below) and

did not apply to other compulsory sequestration proceedings. Indeed, set dividends were disapproved of by the Constitutional Court in *Stratford & others v Investec Bank Ltd & others* (*supra*) 19 in relation to hostile (and thus non-friendly) sequestrations: Leeuw AJ, referring to the ‘nebulous “not-negligible” pecuniary benefit’, held (*ibid*):

‘To my mind, specifying the cents in the rand or “not-negligible” benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin *et al* [*Insolvency Law* para 2.1] state that—

“the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor’s predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order.” . . .

The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the *dicta* outlined in [*Meskin & Co v Friedman* 1948 (2) SA 555 (W); see below]. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; . . . that there is a substantial estate from which the creditors cannot get payment except through sequestration; . . . or that some pecuniary benefit will result for the creditors. Given the potential impeachable transactions detailed by [the present creditor seeking sequestration], totalling over R37 million, it is evident that there is reason to believe that there will be an advantage to creditors.’

Leeuw AJ’s ruling has since been applied, and no specific dividend has been required, in *Shackleton Credit Management (Pty) Ltd v Ngakatau & another* [2022] JOL 52144 (GJ); *Seevnarayan v Ramjathan* 2021 JDR 2726 (GJ); *Body Corporate Bedford Place v*

Mesquita 2021 JDR 2163 (GJ) para 19; *Nortje v Nortje* 2020 JDR 2544 (GP) (a hostile application by an ex-spouse) and

Wild & Marr (Pty) Limited v Ibrahim 2019 JDR 1871 (GJ). As Tshiqi JA, citing *Stratford (supra)*, confirmed, 'Although advantage to creditors is not a rigid concept . . . it requires proof of a tangible benefit to the general body of creditors' (*Body Corporate of Empire Gardens v Sithole & another (supra)* 165).

To enhance the size of his estate, the debtor may renounce in favour of his creditors the protection afforded by s 82(6) in respect of particular movable assets so that these assets may be sold along with the rest of his property (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 125). But it must be noted that this renunciation has also been disapproved in a different court because the protection is intended to benefit debtors, their families and the public, and so the protection cannot be waived (*Ex parte Kroese & another* 2015 (1) SA 405 (NWM), followed in *Ex parte Van Dyk* 2015 JDR 0667 (GP) paras 19–20). In *Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)* [1998] 2 All SA 433 (W), it appeared that the debtor's only asset, a piece of land, could, if rezoned, be sold for nearly three times the price offered for the property at a sale in execution. The court held that, in the light of this fact, a *prima facie* case had been made out that it would be to the advantage of creditors to sequester the estate.

The fact that there will be a significant amount for distribution after the costs of sequestration have been satisfied does not necessarily mean that sequestration will be to the advantage of creditors. Sequestration is, in a sense, merely an elaborate means of execution and, because of its costs, an expensive one too. It is necessary to compare the position of the creditors if there is no sequestration with their position if there is a sequestration. Sequestration will only be to the advantage of creditors if it will result in a greater dividend to them than would

otherwise be the case—eg, through the setting aside of impeachable transactions, or the exposure of concealed assets—or if it will prevent an unfair division of the proceeds of the assets or some creditors being preferred to others (*Gardee v Dhanmanta Holdings & others* 1978 (1) SA 1066 (N) 1068–70). In *Gardee*, a debtor’s only creditor applied to sequester his estate on the basis of a *nulla bona* return. The court held that the creditor had to satisfy it that there was reason to believe that, after the costs of sequestration had been paid, he would recover an amount that was not negligible. He also had to demonstrate some reasonable expectation that the amount would exceed the likely proceeds of ordinary execution. As he had given no information other than that he had obtained a *nulla bona* return, he had failed to show that sequestration would be to his advantage (see also *Mamacos v Davids* 1976 (1) SA 19 (C) and *The Standard Bank of South Africa Limited v Marais* 2022 JDR 0498 (GP)). Compare *Absa Bank Ltd v De Klerk and related cases* (*supra*). In this case, it was held that where the debtor is insolvent and the creditor does not yet hold a judgment upon which he can execute, sequestration will be cheaper, quicker and so more advantageous than forcing the creditor to issue summons and obtain a judgment which the debtor will be unable to satisfy. This approach must be contrasted with the one in *Investec Bank Ltd v Lambrechts NO & others* 2019 (5) SA 179 (WCC). The applicant creditor there was a mortgagee, and the debtor a trust. On the facts, sequestration apparently held no advantage over ordinary execution. The costs and time that the applicant would incur in taking judgment against the debtor would not

exceed the costs and time that would be incurred in obtaining provisional and final sequestration orders. The

bare assertion of a sole secured creditor, the mortgagee with a bond over the debtor's sole asset, was not decisive when the court had to decide the question of advantage to creditors. Sequestration would not benefit another creditor (H) and others that might still emerge. The case for provisional sequestration was marginal. Rogers J held (*idem* 194):

'A marginal excess of liabilities over assets coupled with an, at best, modest benefit to creditors might combine . . . to justify the exercise of a discretion against sequestration. One knows from experience that provisional orders for sequestration and liquidation tend to become self-fulfilling prophecies. In borderline cases decided purely on the affidavits, justice might better be done by leaving a creditor to his usual remedies.'

The court does not have to be satisfied that sequestration *will* benefit creditors financially, merely that there is *reason to believe* that it will:

'[T]he facts put before the Court must satisfy it that there is a reasonable prospect—not necessarily a likelihood, but a prospect which is not too remote—that some pecuniary benefit will result to creditors' (*per* Roper J in *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 559).

It is unnecessary to prove that the debtor has any assets, provided it is shown either that he receives an income of which substantial portions are likely to become available to creditors under s 23(5) (*Ressel v Levin* 1964 (1) SA 128 (C)), or that there is a reasonable prospect that the trustee, by using the machinery of the Insolvency Act, will unearth or recover assets which will yield a pecuniary benefit for creditors (*BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) 720; *Walker v Walker* [1998] 2 All SA 382 (W) 387; *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 583; *Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N) 68–9; *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA) 306). In *Lotzof v Raubenheimer* (*supra*), it was unsuccessfully argued that creditors would not benefit from sequestration because the

debtor had no assets. The debtor had been a farmer just before the application, and he admitted owning a car his wife claimed as her property. The court held that it was inconceivable that he could have carried on farming, even unsuccessfully, with no assets, and accordingly there was a reasonable prospect of an inquiry revealing assets. Besides, an investigation inquiry might show that the car was available for the benefit of creditors. Again, in *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership & others (supra)*, the debtor (a partnership) had been the beneficial owner of an aircraft and had transferred it to another partnership without receiving any discernible benefit in return. The court considered that the transaction could be a voidable disposition or a disposition without value or even a simulated transaction in fraud of the South African Revenue Service. There was thus a reasonable prospect that an investigation and an inquiry by a trustee would yield a benefit to the creditors of the debtor.

The onus of proving advantage to creditors remains on the sequestrating creditor throughout, even where the debtor has clearly committed an act of insolvency (*Wilkins v Pieterse* 1937 CPD 165). Some earlier cases (eg, *Wilkins v Pieterse*) took the view that once an act of insolvency (ie, any act) is proved, the court will require convincing reasons to persuade it that sequestration will not be to the advantage of

creditors. More recently, though, the courts have held that the commission of an act of insolvency is not *necessarily* material to the question of advantage to creditors. Some acts of insolvency, by their nature, tend to indicate an advantage to creditors—for instance, a disposition of

property which prejudices creditors or prefers one creditor above another—but other acts, eg, a *nulla bona* return, do not (see, eg, *Lotzof v Raubenheimer* (*supra*) 93).

3.1.4 'Friendly' sequestration

There is nothing to prevent a debtor from having his estate sequestrated by an amicable creditor. The debtor may, for instance, arrange with a friend to whom he owes a debt that he cannot pay that he (the debtor) will commit an act of insolvency—for instance, write saying that he cannot meet the debt—and the friend will then apply for compulsory sequestration on the strength of this act of insolvency. An application for compulsory sequestration brought by a creditor who is not at arm's length is generally called a 'friendly' sequestration.

In *Craggs v Dedekind; Baartman v Baartman & another; Van Jaarsveld v Roebuck; Van Aardt v Borrett* 1996 (1) SA 935 (C) 937, Conradie J described friendly sequestrations as follows:

'Friendly sequestrations seem to share certain characteristics. Although, like pornography, they may be hard to define, they are easy to recognise. The debt which the sequestrating creditor relies upon is almost always a loan. It is usually quite a small loan, very often made in circumstances where it would have been apparent to the whole world that the respondent was in serious financial difficulty. Despite this, the loan is customarily made without security of any sort. It is seldom evidenced by a written agreement, or even subsequently recorded in writing. The only writing that is produced to the Court is the letter stating, with appropriate expressions of dismay that the debt cannot be paid, and, sometimes, for good measure, setting out details of the respondent's assets and liabilities. Very often debtor and creditor are related: fathers commonly sequester sons, wives sequester husbands and sweethearts sequester each other, without, I am sure, any damaging effect on their relationship.'

In *Smith v Porritt & others* 2008 (6) SA 303 (SCA) 308, Scott JA remarked that, in practice, friendly sequestrations (or friendly liquidations of companies) are commonplace and, in such cases, the motive of the creditor instituting

proceedings is more often than not simply to assist the insolvent (or company).

The legal position regarding friendly sequestrations may be summarized as follows:

- The mere fact that an application for compulsory sequestration is brought by a creditor who is prepared to co-operate with the debtor, or who is motivated partly by a desire to assist the debtor, does not preclude the granting of a sequestration order (*Jhatam & others v Jhatam* 1958 (4) SA 36 (N); *Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd, intervening creditor)* [2000] 2 All SA 485 (SE); *Maritz t/a Maritz & Kie Rekenmeester v Walters & another* 2002 (1) SA 689 (C) 703). An order should not be refused simply because there is goodwill between the parties (*Beinash & Co v Nathan (Standard Bank of South Africa Ltd intervening)* 1998 (3) SA 540 (W) 541; *Esterhuizen v Swanepoel and sixteen other cases* 2004 (4) SA 89 (W) 91).

Page 57

- Yet the court must be mindful of the fact—it being a matter of common experience—that where debtor and creditor in sequestration proceedings are not at arm's length, there is considerable potential for collusion and malpractice. Collusion consists of an agreement between the parties to suppress facts or manufacture evidence in order to make it appear to the court that one of the parties has a cause of action or a defence (*Kuhn v Karp* 1948 (4) SA 825 (T) 827; *Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd, intervening creditor)* (*supra*) 489). Examples of malpractices that typically arise in friendly sequestrations are: reliance on a non-existent claim; inclusion of protected (non-saleable) assets,

overvaluation of assets, or underestimation of costs to convince the court that a significant dividend will be payable; and repeated extensions of the return date for final sequestration (see, eg, *Ex parte Steenkamp and related cases* 1996 (3) SA 822 (W) 825–6; *Beinash & Co v Nathan (Standard Bank of South Africa Ltd intervening)* (*supra*) 542–3; *Esterhuizen v Swanepoel and sixteen other cases* (*supra*) 92–3; *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 582–3; *Ex parte Application: Shmukler-Tshiko* 2012 JDR 1796 (GSJ) paras 16–35). As the high-water mark, the facts of *Huntrex 337 (Pty) Ltd t/a Huntrex Debt Collection Services v Vosloo & another* 2014 (1) SA 227 (GNP) showed so many signs of collusion that it was hard to find that this was a genuine application for sequestration (*idem* 231). The two respondent debtors had tried and failed at debt counselling and then sold and ceded the debts (consisting of the debt counsellors' termination fees) to H. The debtors agreed with H to pay the ceded claims in full and gave H's place of business as their domicile. They did not pay the ceded claims, summons was served by the sheriff on H at its address, and a warrant of execution and *nulla bona* returns followed, forming the basis of H's present application for the compulsory sequestration of the respondents' estates. As the court summarized the collusive aspects of this case (*idem* 231–2): the debtors, after the failed debt counselling and consequent cessions, went to H's office to sign the acknowledgement of debt. They chose a domicile that was not theirs, where they knew that they would not receive court processes. They told the sheriff that they had no assets. H did not instruct the sheriff to search for specific assets that it knew the debtors should have. The debtors collected all the documents in the sequestration application from the sheriff's office. H's

business practice was an underhand scheme with two ulterior motives, one being to help debtors have their estates sequestrated. Material evidence was withheld from the court, such as the sales and cessions and the acknowledgement of debt as well as the further facts revealed in oral evidence.

- The way in which the sequestration process may be abused is aptly described in the following passage from *Mthimkhulu v Rampersad & another (BOE Bank Ltd, intervening creditor)* [2000] 3 All SA 512 (N) 514:

'The steep increases in interest rates by banks and other lending institutions over the past year or two has resulted in a steady if not fast flowing stream of so-called "friendly" sequestrations. Indeed, among certain attorneys it has become quite a cottage industry. The majority of applications are sparked off by the imminent sale of the respondents' property by the Bank. The respondent hurries off to an attorney who is well known for his expertise in these matters and is briefed on the requirements for a friendly sequestration. He duly finds a "creditor" to whom he purportedly is indebted by virtue of an unsecured oral loan in an insignificant amount. He then

Page 58

supposedly writes a letter to his "creditor" which could just as well be headed "Letter in terms of section 8(g) of the Insolvency Act" in which with suitable expressions of dismay and apology, he confesses to be unable to repay the so-called loan. It is not uncommon to find in different applications that the section 8(g) letter contains precisely the same wording which makes one suspect that the attorney specializing in these matters has these letters on a word processor. An application for the sequestration of the debtor is then drafted in which the friendly creditor makes the necessary allegations and in particular expresses his concern for the interests of the body of creditors if the property under attachment were to be sold by public auction. A value of the property on the open market is then given and duly supported by a valuer who also puts up an affidavit. It is also a feature of these applications that the same valuer is employed in each of them. Invariably the application is then moved as a matter of urgency on the afternoon of the day before the sale of the property. If a provisional order is granted, one has the curious phenomenon that the respondent who has co-operated so admirably up until that date cannot be served with the court order for a variety of reasons including that he is evading service, is now living

elsewhere, is away on business, etc. The result is that the return date is extended for a number of times until the genuine creditors have lost interest in the respondent and the rule is then discharged. Alternatively, the provisional order is confirmed, the friendly creditor makes no effort to have a trustee appointed or to prove his claim, no creditor takes steps to prove a claim because of a fear of contribution, the debtor waits for the dust to settle and with his old creditors off his back carries on business as normal.'

As is evident from the quotation from *Mthimkhulu v Rampersad & another (BOE Bank Ltd, intervening creditor)* (*supra*), a friendly sequestration application may be, and often is, brought solely to obtain a stay of civil proceedings, and in particular, the stay of an approaching sale in execution. The debtor resorts to a friendly compulsory sequestration rather than voluntary surrender to achieve the stay because the former procedure is better suited to his purpose: it may be obtained on an urgent basis and without preliminary formalities or advance notice to creditors; it involves a less strenuous onus (the applicant being required to establish merely that there is reason to believe that sequestration will be to the advantage of creditors, not that it *will* be); and the result of the application is, initially, only a provisional order which must be served on the debtor and may be postponed and later discharged at the instance of the sequestrating creditor.

Concerns were also expressed in *Plumb on Plumbers v Lauderdale & another* 2013 (1) SA 60 (KZD) 63–4 that the allegations of fact in the founding affidavits that the court investigated were markedly similar in form and content when the same attorney prepared the applications. The court held that the affidavits could not have correctly represented in each case the facts the deponent believed to be true. The same counsel had moved all the applications and apparently drafted some of the affidavits. The same

person(s) had prepared and finalized the affidavits and should have, or must have, known about the falsity of the allegations in some, if not all, the affidavits. The court stressed the important function of swearing an oath. Making untruthful statements carried grave consequences, and practitioners were warned against the dangers of using precedents to draft affidavits without making sure that the deponent believed all allegations of fact to be true.

- A debtor may even use a friendly sequestration as a method of freeing himself entirely from his debts. As will be seen later (17.1.4(i)), where an application for

Page 59

sequestration is granted and the free residue in the estate turns out to be insufficient to cover the costs of sequestration, any creditors who have proved claims are obliged to contribute to these costs. If the creditors of the debtor in a friendly sequestration are made to believe (eg, because of the paucity of the known assets) that there is an appreciable risk that they will be called upon to pay a contribution should they prove claims, they will refrain from doing so. When no claims are proved within six months after sequestration, the debtor may apply for his rehabilitation and is immediately released from his debts (see 19.2.1(iii)).

- In the light of the above considerations, the courts have accepted that they must, as a matter of policy, scrutinize every friendly sequestration with particular care to ensure that the requirements of the Act are not subverted and that the interests of creditors are not prejudiced (*Klemrock (Pty) Ltd v De Klerk & another* 1973 (3) SA 925 (W); *Epstein v Epstein* 1987 (4) SA 606 (C) 611; *Ex parte Steenkamp and related*

cases 1996 (3) SA 822 (W) 825; *Van Eck v Kirkwood* 1997 (1) SA 289 (SE) 290; *Streicher v Viljoen* [1999] 3 All SA 257 (NC) 261–2; *Dunlop Tyres (Pty) Ltd v Brewitt (supra)* 582; *Esterhuizen v Swanepoel and sixteen other cases (supra)* 92). In particular, the court should, in each case, require the following from the sequestrating creditor:

- full details of the creditor’s claim and *locus standi*, eg, what the claim is for, when and where it arose, the creditor’s relationship with the debtor, who acted for each of the parties, what circumstances rendered it necessary for the debtor to become indebted to the creditor, and the terms of payment or repayment (*Craggs v Dedekind (supra)* 937; *Meyer v Batten* 1999 (1) SA 1041 (W) 1042; *Mthimkhulu v Rampersad & another (BOE Bank Ltd, intervening creditor) (supra)* 517; *Esterhuizen v Swanepoel and sixteen other cases (supra)* 95);
- if the debt is an unsecured loan, an explanation for the lack of security (*Mthimkhulu v Rampersad & another (BOE Bank Ltd, intervening creditor) (supra)* 517);
- documentary evidence establishing that he has actually performed as alleged, eg, receipts, paid cheques, withdrawal slips, invoices (*Craggs v Dedekind (supra)* 937; *Meyer v Batten (supra)* 1042);
- full details of the debtor’s realizable assets, including cogent evidence (not merely the creditor’s opinion) as to what the assets are likely to raise on a forced sale—any expert opinion by a valuer should be based on facts or information properly proved by the valuer or other witnesses and supported by the valuer’s reasons (*Craggs v Dedekind (supra)* 938; *Nel v*

Lubbe 1999 (3) SA 109 (W) 111; *Ex parte Bouwer and similar applications* 2009 (6) SA 382 (GNP) 387–9; *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 155);

- if it appears that another creditor has already attached the debtor’s property in execution, proof that prior notice of the application has been given to that creditor (*Mthimkhulu v Rampersad & another (BOE Bank Ltd, intervening creditor)* (*supra*));
- if he requires an extension of the return date of the rule *nisi*, an affidavit setting out proper reasons for the extension (*Beinash & Co v Nathan (Standard Bank of South Africa Ltd intervening)* (*supra*)).

In *Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC) 19 (see 3.1.3), the court held that ‘specifying the cents in the rand or “not-negligible” benefit in the

context of a hostile sequestration where there could be many creditors is unhelpful’. Footnote 57 ending that sentence observed that courts had required proof of a not-negligible benefit in single-creditor cases and friendly sequestrations. Reading this passage of the *Stratford* judgment as implying that it is unhelpful to specify a set number of cents in the rand in hostile sequestrations but helpful in friendly sequestrations is not supported by the cases in the footnote. In one of them, indeed, the court refused to set such guidelines, because this step would encroach on the legislature’s functions and courts must retain their unfettered discretion to decide each case on its facts (see *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W) 586).

3.2 Application for sequestration

3.2.1 Form and content of application

The application is brought by way of a notice of motion supported by affidavit (for a precedent, see Appendix 1, specimens 2.1 and 2.2). The affidavit must be by the sequestrating creditor or anyone else who can attest positively to the facts. The founding affidavit must set out sufficient facts to establish the requirements for a sequestration order discussed above. The affidavit should contain the following information and averments:

- The full names, status, occupation and address of the sequestrating creditor. It should be made evident that the creditor has *locus standi* to apply. If the application is made in the name of an agent, the affidavit must indicate that the agent is duly authorized to bring the proceedings (*Thorne NO v Sinclair* 1930 EDL 409). And if a director or an official of a company signs the affidavit on behalf of the company, he must allege that he is duly authorized to do so or set out facts establishing as much (*Lurie Brothers Ltd v Arcache* (1927) 48 NPD 139).
- The full names, date of birth, identity number and marital status of the debtor and, if the debtor is married, the full names, date of birth, and identity number of his or her spouse (s 9(3)(a)). It should be made to appear that the court has jurisdiction to hear the application (see 1.4.2). It is generally not competent to join two debtors in one application, even where they are jointly and severally liable to the creditor (*Ferela (Pty) Ltd v Craigie & others* 1980 (3) SA 167 (W); *Huntrex 337 (Pty) Ltd t/a Huntrex Debt Collection Services v Vosloo & another* 2014 (1) SA 227 (GNP) 228; *Strutfast (Pty) Ltd v Uys & another* 2017 (6) SA 491 (GJ)), but joinder may possibly be

allowed where all the interested parties consent or where there is complete identity of interests (*Main Industries (Pty) Ltd v Serfontein & another* 1991 (2) SA 604 (N)).

- Section 17(4)(b) of the Matrimonial Property Act 88 of 1984 provides that an application to sequester the joint estate of spouses married in community of property must be made against both spouses. The section is peremptory, so the creditor has to ascertain in advance which matrimonial regime applies (*Detkor (Pty) Ltd v Pienaar* 1991 (3) SA 406 (W)). Under the proviso to the section, though, the court cannot dismiss an application for the sequestration of a debtor's estate on the ground that it is a joint estate if the applicant satisfies the court that, despite reasonable steps on his part, he could not establish whether the debtor was married

in community of property or the name and address of the debtor's spouse. For example, in *JM Busha Investment Group (Pty) Ltd v Huxley* [2022] ZAGPJHC 439 (1 July 2022) the respondent and his wife had skipped bail and fled back to Malawi. The applicant had no way of ascertaining their marital status beyond their marriage certificate attached to the respondent's answering affidavit (*idem* paras 50–6). Further, the failure to follow s 17(4)(b) does not, in itself, invalidate the proceedings or the court's order (cf *Absa Bank Ltd t/a Trust Bank v Goosen* 1998 (2) SA 550 (W) 552). So, for example, in *Ratila v Dos Santos* 1995 (4) SA 117 (W), where the applicant had obtained a provisional sequestration order against a joint estate without joining the other spouse (and without meeting the requirements of the s 17(4)(b)

proviso), the court granted an extension of the rule *nisi* to enable the applicant to serve the papers on the other spouse.

- The amount, cause and nature of the claim and a statement about whether the claim is secured or not and, if it is, the nature and value of the security (s 9(3)). It should appear from the information furnished that the sequestrating creditor is entitled to bring the application under s 9(1). If he applies as a cessionary, details of the cession should be given (cf *Van der Merwe and Sellar v Uys* 1932 OPD 125).
- The act (or acts) of insolvency committed by the debtor and/or his actual insolvency. If the creditor relies on an act of insolvency, he should follow the wording of the Act in describing it (cf *Merrick & Co v Drew* (1908) 29 NLR 557) and set out the facts that gave rise to the alleged act (cf *Linder Bros v Gordon* (1913) 34 NPD 225). If the act of insolvency alleged is a *nulla bona* return or written notice of inability to pay, the return or notice should be attached to the affidavit. (See *Kader v Haliman* 1958 (4) SA 31 (N) 32 for the statements which should be contained in a *nulla bona* return.) If the return is incomplete or defective, the creditor or his legal representative should have it rectified by the relevant serving officer before going ahead with the application (*De Wet v Le Riche (supra)*). And if the return is on the judgment of another creditor, the sequestrating creditor must allege that the judgment remains unsatisfied (*In re Harpur* (1882) 2 EDC 103 107). In an application on a return which is not recent, the creditor must make averments supported by facts that the debtor's position is unchanged (*Bhyat v Khurishi* 1929 TPD 896). If the creditor bases his application on the debtor's insolvency, he should allege this and support the allegation with some *prima facie* evidence of

insolvency (*Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T) 59). If the creditor relies on the debtor's words, he must state the exact wording and leave it to the court to decide whether that amounts to an act of insolvency (*Wepener v Ericson* 1926 WLD 81 83).

- An averment that sequestration will be to the advantage of creditors and an explanation why this will be so (*London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) 593). If reliance is placed on the fact that immovable property will form part of the insolvent estate, the applicant should adduce expert evidence establishing how much the property will probably yield for the free residue. The expert should set forth the amount that the property is likely to realize in an insolvency sale and the basis on which he has formed his opinion. A mere statement of amount without reasons is not enough (*Nel v Lubbe* 1999 (3) SA 109 (W) 111–12).
- Any other relevant facts which might influence the discretion of the court in granting or refusing a sequestration order, eg, the fact that the debtor has a claim for damages

Page 62

against the creditor which is the subject of a pending action (*Barclays Bank v Giles* 1931 TPD 9).

- A statement that security will be furnished to the Master and his certificate obtained as required by s 9(3) (see 3.2.2(i)). If this has already been done, the certificate should be attached to the affidavit.
- A statement that a copy of the papers will be lodged with the Master with a view to obtaining his report in terms of s 9(4) (see 3.2.2(iv)).
- A statement confirming that copies of the application will be furnished to interested parties as required by

s 9(4A)(a), and that an affidavit will be filed before or during the hearing, setting out how the section was followed (see 3.2.2(v)).

In preparing the application, the utmost care should be taken to see that the founding affidavit meets the requirements of the Act, and that the applicant's case is properly made out. Originals of supporting documents need not be attached to the application but must be available for inspection by the court (*Sugden & others v Beaconhurst Dairies (Pty) Ltd & others* 1963 (2) SA 174 (E) 187). Save in exceptional circumstances, and subject always to the overriding jurisdiction of the court, an applicant in motion proceedings may not introduce new matter in his replying affidavit (*Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) 205; cf *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O), in which the court allowed the creditor to introduce new matter in his replying affidavit because the ramifications of the debtor's affairs were extensive and complex and the creditor could not have had all the relevant facts at his disposal before he began his application).

In *Uys & another v Du Plessis (Ferreira intervening)* 2001 (3) SA 250 (C), the court allowed an applicant to include, as part of his case against the debtor, the founding affidavit of an intervening creditor in a separate application for the sequestration of the debtor's estate. The court held that the applicant could rely on this affidavit to show that the debtor was factually insolvent and had committed certain acts of insolvency. Knoll AJ observed (*idem* 254):

'[T]o adjudicate [on the case] . . . without reference to the intervening creditor's papers, would be artificial and could redound to the disadvantage of the general body of creditors. Should the applicant not be entitled to refer to such papers and rely on admissible evidence contained therein, he would of necessity wish to incorporate such evidence in his own case by way of affidavits. This would result in an unnecessary and costly duplication of papers [T]he respondent is not prejudiced by

. . . reliance on any evidence presented by the intervening creditor. He has had a full opportunity to canvass all the relevant issues.'

3.2.2 Steps prior to adjudication on application

(i) Security for costs

A creditor who institutes sequestration proceedings is bound to prosecute them at his own expense until a trustee or a provisional trustee has been appointed (s 14(1)). For this reason, he is required to deposit with the Master security for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs until the appointment of a trustee or provisional trustee, or if none is eventually appointed, all fees and charges necessary for the discharge of the estate from sequestration. A certificate from the Master that the necessary security has been lodged must be given not more than ten days before the date of the application and must

Page 63

accompany the application (s 9(3)). As regards this latter requirement, the courts have held that:

- the expression 'date of the application' refers to the date of *signature* of the notice of motion, not the date of the hearing (*Thomas v Cakebread* 1975 (1) SA 616 (D)), the legislature intending that the party giving security should have ten days after doing so to proceed with his sequestration application (*Intercontinental Exports (Pty) Ltd v Fowles* 2000 (4) 833 (W) 835);
- the requirement that the certificate 'accompany the application' means merely that the certificate must be before the court when the application is heard, not that it must accompany the application when it is filed with the Registrar or served on the respondent (*Court*

v Standard Bank of SA Ltd; Court v Bester NO & others 1995 (3) SA 123 (A) 131).

(ii) Search of Master's records

In the Western Cape High Court, it is a rule of practice that the applicant's attorney must file an affidavit stating that he has searched the records in the Master's Office and it does not appear from that search that the debtor's estate is already under sequestration or that he has published a notice of intention to surrender (*In re Hugo* 1921 CPD 742).

(iii) Filing of application at court

The applicant must file the notice of motion, founding affidavit and supporting documents with the Registrar before the application is heard.

(iv) Master's report

Before the court can adjudicate upon an application, a copy of the notice of motion and the founding affidavit(s) must be lodged with the Master (s 9(4)). If there is no Master at the seat of the court, the papers must be lodged with an officer in the public service designated for that purpose by the Master in the *Gazette* (*ibid*). The Master or the designated officer may then make a written report to the court of any facts which he has ascertained which would appear to him to justify the court in postponing the hearing or in dismissing the application (eg, that the debtor's estate has already been sequestrated). A copy of this report must be transmitted to the sequestrating creditor or his agent (s 9(4)), who may file an answering affidavit if he wishes (s 9(5)).

It must be remembered that in the Western Cape, a Master's report must be obtained and filed before the set-down of the application (*Practice Note No 5, as amended* 2000 (4) SA 135 (C); cf 2.5.4 about voluntary surrender).

The requirements of the practice note extend to applications for provisional orders of sequestration and liquidation (see item 3 of the practice note and therefore also 23.2.5(ii) for applications for the winding up of a company by the court).

(v) Copy of papers to debtor and other parties

On presenting his application to the court, the applicant must furnish a copy of the application to the debtor (s 9(4A)(a)(iv)). But the court may, in its discretion, dispense with this requirement and make a provisional order of sequestration without advance notice to the debtor if it is satisfied that this would be in the interest of creditors or of the debtor (*ibid*).

Page 64

As this section uses not the word 'serve' but the word 'furnish', which is not a term of general application in civil practice or procedure, it seems clear that the legislature intended that informal service would suffice (*Berrange NO v Hassan & another* 2009 (2) SA 339 (N) 353). The creditor would necessarily have to make out a case in his founding affidavit to dispense with the furnishing of the application. Relevant factors in this regard include the urgency of the matter and the conduct of the debtor in relation to his assets. The court should obviously weigh up the respective interests of the creditor and the debtor and consider any potential prejudice to the creditor if the debtor is forewarned of the impending application (*Berrange NO v Hassan & another* (*ibid*); cf *Fisher v Pujol* 1972 (2) SA 496 (T); Rule 6(2) read with Rule 6(5)(a) of the Uniform Rules of Court). There is no exhaustive list of relevant factors, and each case will depend on its own circumstances (*Berrange NO v Hassan & another* (*supra*) 353). The word 'furnish', envisaging a lower threshold for notifying employees than the word 'serve', 'requires that petitions "must be made

available in a manner reasonably likely to make them accessible to the employees” (*Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC) 17, approving *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) 534). In *Stratford (supra)*, the Constitutional Court held that it was sufficient service for this purpose that a copy of the application intended for the notice of a domestic employee had been left on the kitchen table. We suggest using SMS or WhatsApp as well to communicate with these employees by cellphone (cf 1.7.3(ii), second bullet and 3.2.4).

As to the practice of the various High Courts before the introduction of s 9(4A)(a)(iv), see *Gouws v Scholtz* 1989 (4) SA 315 (NC); *Van Wyk, Von Ludwig & Hanekom Inc v Ferguson* [2001] 2 All SA 592 (C). In view of s 9(4A)(a)(iv), it would seem that it is no longer permissible for a court to grant a provisional order *ex parte* merely because the applicant has clear documentary evidence, such as a *nulla bona* return. For criticism of the latter practice, see *Stride v Castelein* 2000 (3) SA 662 (W) 669. See also *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D), in which it was held that a clause in a settlement agreement that entitled a creditor to reinstate a sequestration application without notice to the debtor was contrary to public policy.

Besides providing a copy of the application to the debtor, the applicant is required to furnish a copy to:

- every registered trade union that, as far as he can reasonably ascertain, represents any of the debtor’s employees;
- the debtor’s employees themselves; and
- the South African Revenue Service (s 9(4A)(a)(i)–(iii); within a reasonable time before the application is heard (*Sphandile Trading Enterprise (Pty) Ltd & another v Hwibidu Security Services CC & another* 2014 (3) SA 231 (GJ) 236–8).

The applicant must furnish the debtor's employees with a copy of the application in one of these ways:

- by affixing a copy of the application to any notice board to which he and the employees have access inside the debtor's premises; or
- if the applicant and the employees do not have access to the debtor's premises, by affixing a copy of the application to the front gate of the premises; or
- failing the latter, by affixing a copy of the application to the front door of

Page 65

the premises from which the debtor conducted any business at the time of the presentation of the application (s 9(4A)(a)(ii)(aa)–(bb)).

The applicant is obliged, before or during the hearing, to file an affidavit, by the person who furnished copies of the application to the debtor and other parties mentioned above, setting out how he met the requirements of the Act in this regard (s 9(4A)(b)). The affidavit must be made by the person who actually furnished the application (such as the sheriff), not the one who simply arranged for it to be furnished (usually the applicant's attorney of record) (*Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* 2015 (2) SA 550 (GJ) 557). He must state what he did when he reached the place of employment, which circumstances he found there, and which steps he took to bring the application to the employees' notice and find out whether they belonged to a trade union (*idem* 551 (headnote) 558). Impossibility of compliance, and unusual forms of compliance, must also be mentioned and explained (*EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* (*supra*) 534).

The requirements of giving notice to all interested parties and filing an affidavit detailing what has been done are peremptory (*Standard Bank of SA Ltd v Sewpersadh & another* 2005 (4) SA 148 (C) 156; *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd (supra)* 532 534–5). But it seems that the court will insist on exact compliance with these requirements only to the extent that the applicant can do this. In *Hannover Reinsurance Group Africa (Pty) Ltd & another v Gungudoo & another* 2012 (1) SA 125 (GSJ), the applicants did not serve the application on the respondent's employees and file the appropriate affidavit because there was no indication that the respondent had employees. The court rejected the argument that non-compliance with s 9(4A)(a) and (b) was fatal to the application. It pointed out (*idem* 132) that compliance with these requirements presupposes knowledge of the existence of employees or at least reasonable grounds to suspect that there may be employees. The court added that even where the applicant suspects that there may be employees, if he cannot obtain further information then the best that he can do is to state that he cannot determine whether there are employees or whether they are unionized. Similarly, in *Hendricks NO & others v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC) 286 (a case about the equivalent notice requirements under s 346(4A) and s 346A of the Companies Act 61 of 1973), it was accepted that personal notification to the relevant employees instead of notice in the prescribed manner will suffice if the employees are no longer at the company's principal place of business or at its alternative premises (*idem* 286–7). Cf also *Moodliar NO & others v Hendricks NO & others* 2011 (2) SA 199 (WCC) 206, in which Davis J considered that the court may allow substantial compliance with the relevant provisions. In *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd (supra)* 535, the Supreme Court of Appeal held that the modes of furnishing the application papers to the employees are directory and no more than

guides, and that alternative means may be adopted. The methods of furnishing the papers must not be turned into peremptory requirements. Nor does the court have to be satisfied that the application papers have actually come to the attention of all employees; the section does not require this.

Under s 197B(2) of the Labour Relations Act 66 of 1995, an employer who receives an application for sequestration of his estate must supply a copy of the application to any 'consulting party' as contemplated in s 189 of that Act. The

meaning of 'consulting party', which appears from s 189, is essentially the party or parties whom the employer would be obliged to consult when deciding whether to dismiss an employee for operational reasons (see also 2.5.3).

3.2.3 Provisional sequestration

The sequestrating creditor must approach the court twice: once to obtain a provisional order of sequestration (s 10), and the second time to have the provisional order confirmed and made final (s 12). On each occasion, the creditor must establish the same requirements, but the standard of proof differs. At the provisional stage, the court must be of the opinion that *prima facie* the requirements for a sequestration order are satisfied; at the final stage, the court must be satisfied that those requirements are proved on a balance of probabilities (*Sacks Morris (Pty) Ltd v Smith* 1951 (3) SA 167 (O) 170; *Lindhaven Meat Market CC v Reyneke* 2001 (1) SA 454 (W) 460). A final order cannot be granted without a provisional one first being made (*Mercantile Bank v Ross* 2021 JDR 1953 (GJ) para 41); so, if the provisional order granted is for some reason a nullity, then the final order must suffer the same fate (*Moch v*

Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) 9–10).

When a provisional order of sequestration is applied for, the following items must be before the court:

- The notice of motion (including a draft of the desired provisional order of sequestration) and the founding affidavit(s).
- The Master's certificate that security has been given.
- The affidavit of search made by the sequestrating creditor's attorney (in the Western Cape).
- The Master's report or, if none, proof of service of the papers on him.
- The sequestrating creditor's affidavit (if any) responding to the Master's report.
- An affidavit by the person who furnished copies of the application to the debtor and other interested parties in compliance with s 9(4A)(a), setting out how this was done.

After considering the documents placed before it, the court may make an order sequestrating the estate of the debtor provisionally, or it may dismiss the application, or it may postpone the hearing, or it may make such other order as appears to be just in the circumstances (s 9(5)). On making a provisional sequestration order, the court must simultaneously grant a rule *nisi*, ie, an order calling on the debtor to show cause, on a day mentioned in the rule, why his estate should not be finally sequestrated (s 11(1)).

An order of provisional sequestration gives the creditor a simple and speedy remedy for preserving the debtor's estate and enforcing his claim (*Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W) 80). The court may make the order based on incomplete information or hearsay evidence, although it cannot rely on evidence obtained in violation of the debtor's constitutional rights (*Lenco Holdings Ltd & others v Eckstein & others* 1996 (2)

SA 693 (N); *Lotter v Arlow & another* 2002 (6) SA 60 (T) 64). What amounts to a *prima facie* case for the purposes of s 10 differs according to whether the debtor has placed facts in dispute. If he has not done so, the test is the one normally applied to determine whether a litigant has established a *prima facie* case: whether the creditor's allegations, if taken to be true, satisfy the requirements for a sequestration order. If

Page 67

the debtor has raised a factual dispute, the test for establishing a *prima facie* case is whether, on a consideration of all the affidavits (ie, those filed for *both* creditor and debtor), the requirements for sequestration are established on a balance of probabilities. In *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A), Corbett JA explained the reason for the difference in approach (*idem* 976):

'Where the application for a provisional order . . . is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the *onus* lies, having to establish a *prima facie* case . . . seems wholly appropriate; but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the Court should decide whether or not to grant an order without reference to respondent's rebutting evidence.'

If, in an opposed application, the creditor manages to establish a balance of probabilities in his favour, the court will generally refuse any application by the debtor to refer the matter to oral evidence (to disturb the balance of probabilities). If the creditor cannot show that the probabilities favour him, he may apply for an order referring the matter to oral evidence (*Provincial Building Society of South Africa v Du Bois (supra)* 80–2; *Kalil v Decotex (Pty) Ltd & another (supra)* 978–9; *Premier Western Cape & others v Parker & Mohammed & others* [1999] 1 All SA 176

(C) 179). The court will be more inclined to grant this application if the probabilities are evenly balanced than if they favour the debtor (*Kalil v Decotex (Pty) Ltd & another (supra)* 979; *Atkinson v Rare Earth Extraction Co Ltd* 2002 (2) SA 547 (C) 553).

The courts accept the proposition that, since sequestration procedure does not exist to settle disputed claims (*Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV & another v Honig* 2012 (1) SA 247 (SCA) 251–2), if the debtor disputes the creditor's claim, genuinely and on reasonable grounds, then, irrespective of where the probabilities lie, the court should postpone the sequestration proceedings until after the creditor has proved his claim (*Payslip Investment Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (C) 783; *Lindhaven Meat Market CC v Reyneke (supra)* 458–9; *Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N) 66). In *Payslip Investment Holdings CC v Y2K TEC Ltd (supra)*, Brand J observed (*idem* 783):

'[A] distinction is . . . drawn between disputes regarding the respondent's [debtor's] liability to the applicant [creditor] and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, *inter alia*, the strength of the respondent's case and the prospects of *viva voce* evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and *bona fide* grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities.'

3.2.4 Service of rule *nisi*

The rule *nisi* (together with the application papers if the debtor has not already been served with them) must be served on the debtor in accordance with the Rules of Court (*Asmal Wholesalers (Pty) Ltd v Dawood; Marshall*

Industrials Ltd & another intervening 1963 (1) SA 250 (N) 255). If the debtor has been absent for 21 days from his

usual place of residence and from his business, if any, within the Republic, the court may direct that the rule will be sufficiently served if a copy is attached to the door of the courthouse and published in the *Gazette*, or the court may direct some other mode of service (s 11(2)). It has been held that this provision is permissive, not peremptory (*Asmal Wholesalers (Pty) Ltd v Dawood; Marshall Industrials Ltd & another intervening (supra)* 254). If the court decides to give instructions about service, it need not choose the mode of service described in the Act but may determine and select the most practical way of bringing the rule to the attention of the respondent (*Skordis v Nissiotis* 1955 (1) SA 395 (D) 397). To overcome the difficulties of serving the sequestration application on the respondent personally, the court allowed service via e-mail, WhatsApp, and publication in a newspaper in *Chemagic (Pty) Ltd v Van der Schyff* 2021 JDR 3342 (GJ) para 2. The next question is whether, to keep pace with technological developments and if the requirements are met, the South African courts will allow court documents to be served using an NFT. ('Non-fungible tokens (NFTs) are cryptographic assets on a blockchain with unique identification codes and metadata that distinguish them from each other. . . . Unlike cryptocurrencies, they cannot be traded or exchanged at equivalency. This differs from fungible tokens like cryptocurrencies, which are identical to each other and, therefore, can serve as a medium for commercial transactions' (Sharma, 'Non-Fungible Token (NFT)' (*Investopedia*, 22 June 2022) <<https://www.investopedia.com/non-fungible-tokens-nft-5115211>< (accessed on 27 July 2022).) The South African

courts may study the order of the Supreme Court of New York State declaring that the court order was to be served via a special-purpose Ethereum-based token delivered—airdropped—into a wallet with a specified address (see *LCX AG v John Doe Nos. 1–25*, Index No. 154644/2022, New York, Andrea Masley, J.S.C., 2 June 2022 <https://www.hklaw.com/-/media/files/generalpages/lcx-ag-v-doe/ordertoshowcause_15.pdf?la=en> (accessed on 23 July 2022); Scott *Business Day* (22 July 2022) 13). Such a flexible solution in the appropriate circumstances would be facilitated by the open-ended provisions of s 11(2) authorizing the court to direct some other mode of service, combined with the decision in *Skordis v Nissiotis (supra)* 397 that the court may determine and select the most practical way of bringing the rule to the respondent's attention.

A copy of the rule *nisi* must also be served on any registered trade union that represents the debtor's employees (s 11(2A)(a)), the employees themselves (s 11(2A)(b)), and the South African Revenue Service (s 11(2A)(c)). Furnishing the application to the South African Revenue Service (s 9(4A)) and serving the provisional sequestration order on it (s 11(2A)(c)) are both peremptory requirements (*Chiliza v Govender & another* 2016 (4) SA 397 (SCA) 401). Service on the debtor's employees must be effected either:

- by affixing a copy of the petition to a notice board to which the employees have access inside the debtor's premises; or
- if they do not have such access, by affixing a copy of the petition to the front gate; or,
- failing the latter, by affixing a copy of the petition to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application (s 11(2A)(b)).

To effect service meeting the above requirements, the sheriff must establish whether the employees are represented by a registered trade union and whether there is a notice board inside the employer's premises to which the employees have access (s 11(4)).

3.2.5 Opposition to application

After the granting of the rule *nisi*, the debtor (if he has not already done so) and other interested parties may oppose the application by filing affidavits with the Registrar setting out the grounds of their opposition. These affidavits must be served on the sequestrating creditor in enough time to enable him to reply before the return day. If a provisional trustee (see 8.4) obtains information which has a bearing on the various matters arising for determination on the return day, he may place the information before the court by way of affidavit, although he is under no statutory duty to do so (*Smith and Walton (SA) (Pty) Ltd v Holt* 1961 (4) SA 157 (D)).

3.2.6 Anticipation of return day

On the application of the debtor, the court may anticipate the return day of the rule *nisi* for the purpose of discharging the provisional order, provided 24 hours' notice of the application has been given to the sequestrating creditor (s 11(3)). The court will anticipate the return day only if it is satisfied that *all* creditors, not merely the sequestrating creditor, have been given notice and that none has any valid objection, or if it is obvious that creditors will not oppose the discharge of the rule (*Ferros (OVS) Staalvensterfabrieke (Edms) Bpk v Sullivan* 1959 (2) SA 531 (O); *Regular Investments (Pty) Ltd v Du Plessis* 1972 (2) SA 493 (O)).

3.2.7 Intervention by another creditor

In *Fullard v Fullard* 1979 (1) SA 368 (T), the position on a creditor's intervention was stated as follows: a creditor is entitled to intervene at any stage, either to have the provisional order set aside, or, where the sequestrating creditor withdraws his application or drags his feet, to obtain a fresh sequestration order in his own right and name. In the latter event, the existing sequestration order cannot be confirmed at the instance of an intervening creditor: it must be set aside, and a fresh order must be issued with the intervening creditor as the applicant. He then becomes the *dominus litis* (the controller of the lawsuit), and the original applicant drops out of the picture. The intervening creditor must make out a case for sequestration, furnish security for costs, and so on, as though he were the original applicant, but he does not have to restate facts which appear from the record in the existing proceedings. The court 'takes a practical view in these matters, and also bears in mind the interests of the general body of creditors' (*per* Holmes J in *Jhatam & others v Jhatam* 1958 (4) SA 36 (N) 38). In *M&V Tractor and Implement Agencies BK v Vennootskap DSU Cilliers en Seuns en andere (Kelrn Vervoer (Edms) Bpk tussenbeitredend)* 2000 (2) SA 571 (NC) 577, the court pointed out that intervention by a creditor in insolvency proceedings differs substantially from conventional intervention and is, from a procedural point of view, unique (*sui generis*), being a substantive application which is launched when the creditor arrives at court with his own evidence (usually on the return day). The intervening creditor may also apply for leave to intervene to oppose the final order of sequestration where she (like the wife of the respondent debtor in the present case) has a

material interest in the subject matter of the litigation (*Mercantile Bank Limited v MMR (MBR intervening party)* 2022 JDR 0681 (GJ)). In the *MMR* case, the allegations made implicated the wife, and if she were not allowed the opportunity of rebutting them, her property would remain at risk because of the judge's *prima facie* prejudicial conclusions.

3.2.8 Final sequestration

On the return day, besides the papers filed at the provisional stage, the court must have before it:

- the sheriff's return of service of the rule *nisi*;
- any opposing affidavits of the debtor and/or other interested parties;
- the replying affidavit of the applicant; and
- any affidavit by the provisional trustee.

The practice is for the applicant's counsel to appear in court and ask for the provisional order of sequestration to be made final (or for alternative relief). The insolvent may appear personally or be represented by counsel to oppose the granting of a final order, and other creditors may appear to oppose or support it.

The sequestrating creditor bears the onus of proving on a balance of probabilities that the requirements for final sequestration have been met. There is no onus on the debtor but an evidentiary burden to show that the provisional order is resisted on *bona fide* and reasonable grounds (*Hannover Reinsurance Group Africa (Pty) Ltd & another v Gungudoo & another* 2012 (1) SA 125 (GSJ) 137). If the court is satisfied that the creditor has discharged the onus resting on him, it may confirm the provisional order. If the court is not so satisfied, it must either dismiss the application and set aside the provisional order or require the creditor to produce further proof of the allegations in his application and postpone the hearing for a

reasonable time, but not without setting a day (*sine die*) (s 12(2)). The court may allow such further proof in a replying affidavit, subject to the debtor's being allowed an opportunity to deal with the new matter (*Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) 625). It has been held that since the ordinary procedure for settling disputed questions of fact is by oral evidence, the court cannot make a final order of sequestration on papers which raise disputes of fact unless it is satisfied that oral evidence will not disturb the balance of probabilities (*Mahomed v Malk* 1930 TPD 615).

Whether, in particular circumstances, an application for sequestration should be dismissed or whether further proof of insolvency should be allowed is a matter relating to the conduct of the business of the court hearing the application. A court of appeal can interfere only if the court *a quo* (whose decision is being appealed) exercised its discretion capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question, or did not act for substantial reasons (*Ganes & another v Telecom Namibia Ltd* (*supra*)).

When a provisional order of sequestration has been made final, the date of sequestration is from then onwards for all purposes taken to be the date upon which the provisional order was originally granted and not the date upon which it was made final (see the definition of 'sequestration order' in s 2).

3.3 Court's discretion

Even if the court is satisfied that the requirements discussed above have been established on a balance of probabilities, it is not obliged to grant a final order of

sequestration. In each case, the court has an overriding discretion, to be exercised upon a consideration of all the circumstances (*Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D) 219). So the court exercised its discretion against sequestration, despite the proof of an act of insolvency and the other requirements of a sequestration order, where the debtor furnished independent evidence that his estate was solvent (*Chenille Industries v Vorster* 1953 (2) SA 691 (O); cf *Berrange NO v Hassan & another* 2009 (2) SA 339 (N) 368, though the creditor whose claim has not been paid by a set date may still be allowed to approach the court on the same papers for a final sequestration order (*The Standard Bank of South Africa Limited v Marais* 2022 JDR 0498 (GP)), where the debtor had instituted an action for damages against the creditor which, if successful, would wipe out the creditor's claim (*Swellendam Municipality v Kennedy* 1934 CPD 448), or where the creditor's real motive was to prevent the debtor from enforcing a claim against his (the creditor's) son (*Amod v Kahn* 1947 (2) SA 432 (N)).

The debtor's commission of an act of insolvency is an important consideration in the decision whether his estate should be sequestrated. In *Metje & Ziegler Ltd v Carstens* 1959 (4) SA 434 (SWA) 435, Hall JP considered that this commission places the sequestering creditor in a 'much stronger position' than a mere general allegation of insolvency. In *De Waardt v Andrew & Thienhaus Ltd* 1907 TS 727, Solomon J held (*idem* 736–7):

'In my opinion, where it is clearly proved that a man has committed an act of insolvency it is a matter of discretion for the judge to decide whether or not he shall sequester the estate, and he is not debarred from doing so merely because the debtor produces evidence to show that his assets are in excess of his liabilities. In such cases [the judge] may either sequester the estate, or he may in the exercise of his discretion give the insolvent time to pay.'

See also *Berrange NO v Hassan & another* (*supra*) 368–9.

3.4 Costs of proceedings

From the first available funds of the estate the trustee must reimburse the sequestrating creditor his taxed costs in sequestrating the debtor's estate (s 14(2)). No claim need be proved for these costs, as they form part of the costs of sequestration (ss 97(2)(c) and 97(3)).

Costs of opposing the sequestration are not paid as part of the costs of sequestration unless the court has so ordered when granting the final sequestration order (s 97(3)). The court will make this order only if it considers that the opposition was both in good faith and reasonable (reasonable in the sense that there were reasonable prospects of its being successful) (*Absa Bank Ltd v Rhebokskloof (Pty) Ltd & others* 1993 (4) SA 436 (C) 450–1; *Van Wyk, Von Ludwig & Hanekom Inc v Ferguson* [2001] 2 All SA 592 (C) 603). A stricter approach was followed in another line of cases to the effect that such an order would be made only if justified by special circumstances (*Marshall Industrials Ltd v Pillay & another* 1956 (4) SA 580 (D) 581; *Cohen v Mallinick* 1957 (1) SA 615 (C) 623–4; *Tewari v Secura Investments* 1960 (3) SA 432 (N) 434–5 (a full court); and

Page 72

Meaker NO v Heyns & others 1965 (3) SA 496 (SR) 501–2). The less demanding view was taken in *Matsepe NO v Plaatjie NO* 2020 JDR 1327 (FB) para 9.3 that

'[b]ona fides and prospects of success on all the elements of sequestration should be considered. It is the task of the court to determine a just and equitable costs order. The court must traverse the history of a case, the conduct of the parties and the merits of the matter' (citing *Van Der Walt v Murray* 2019 JDR 1702 (FB) para 16).

The costs of a creditor's intervention are regarded as costs of sequestration if the intervention was necessary and in good faith (*Ex parte Jordaan: In re Grunow Estates (Edms)*

Bpk v Jordaan 1993 (3) SA 448 (O)). A creditor who has been put to the expense of intervening to oppose an application of questionable merit may be awarded costs on the attorney and client scale (cf *Reuben Rosenblum Family Investments (Pty) Ltd & another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd & others intervening)* 2003 (3) SA 547 (C) 550).

3.5 Unwarranted or vexatious proceedings

As a safeguard against creditors' abuse of the power to bring compulsory sequestration proceedings, the Act provides that whenever the court is satisfied that an application for sequestration is an abuse of the court's procedure or is malicious or vexatious, it may allow the debtor immediately (for instance, at the hearing of the application for final sequestration) to prove any damage which he has sustained by reason of the presentation of the application and award him such compensation as the court may consider fit (s 15). The debtor is not confined to this method of obtaining summary relief, though, and may choose to institute action at common law to recover damages on the ground that the creditor brought the proceedings maliciously and without reasonable and probable cause.

3.6 Setting aside sequestration order

Any person aggrieved by a final order of compulsory sequestration, or by an order setting aside an order of provisional sequestration, may appeal against the order (s 150(1); cf *Louw v WP (Koöperatief) Bpk* 1998 (2) SA 418 (SCA)). The aggrieved person must first obtain leave to appeal from the appropriate court (s 17 of the Superior Courts Act 10 of 2013), and then go ahead with the appeal

promptly (*Beira v Raphaely-Weiner & others* 1997 (4) SA 332 (SCA) 337). No appeal lies against either the granting of a provisional sequestration order (*Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 7) or the refusal of such an order (*Gottschalk v Gough* 1997 (4) SA 562 (C) 568).

The power of the court to rescind or vary a sequestration order under s 149(2) and s 54(5) has been discussed in the previous chapter (see 2.8).

In *Rutherford v Ferguson & others* 2000 (2) SA 275 (O), an insolvent whose estate had been compulsorily sequestrated sought a declaration under s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 that the court which had granted the sequestration order had lacked the necessary jurisdiction to do so and, accordingly, that the sequestration order was a nullity. The insolvent did not indicate whether he had opposed the sequestration, why he could not obtain relief by appealing under s 150 of the Insolvency Act, the extent to which the liquidation and distribution of the estate assets had progressed, and why creditors who had received dividends (if any) had not been joined

as respondents (since they would be detrimentally affected by a declaration of nullity). The court upheld an exception that the particulars of claim failed to disclose a cause of action. In the court's view, the insolvent had failed to show which existing, future or contingent rights and/or obligations were the object of the declaration and had also failed to make out a case on which the court could exercise its discretion under s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959. (The corresponding provision now is s 21(3)(c) of the Superior Courts Act 10 of 2013.)

Part 3

Effects of sequestration

Chapter 4:

The legal position of the insolvent

- 4.1 Contracting
- 4.2 Earning a livelihood
- 4.3 Instituting and defending legal proceedings
- 4.4 Holding office

Chapter 5:

Vesting of the assets of the insolvent

- 5.1 Vesting of estate in trustee
- 5.2 Property which falls into estate
- 5.3 Property which does not fall into estate
- 5.4 Disposal of estate property by insolvent
- 5.5 Acquisition of new estate during insolvency

Chapter 6:

Vesting of the assets of the solvent spouse

- 6.1 Vesting of assets in trustee
- 6.2 Release of solvent spouse's property by trustee
- 6.3 Release of property by court
- 6.4 Rights of solvent spouse's creditors in respect of property not released
- 6.5 Sequestration of solvent spouse's estate

Chapter 7:

Uncompleted contracts and legal proceedings not yet finalized

- 7.1 Contract completed by insolvent but not by other party

- 7.2 Contract not completed by insolvent
 - 7.3 Purchase and sale of immovable property
 - 7.4 Instalment agreement regarding movable goods
 - 7.5 Sale of movable property under a contract that is not an instalment sale
 - 7.6 Lease
 - 7.7 Employment contract
 - 7.8 Transactions on market infrastructure
 - 7.9 Agreements providing for termination and netting
 - 7.10 Provisions designed to protect solvent party
 - 7.11 Legal proceedings commenced before insolvency
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Chapter 4

The legal position of the insolvent

Synopsis

- 4.1 Contracting
 - 4.1.1 Prohibited contracts
 - 4.1.2 Effect of contract which is not prohibited
 - 4.1.3 Effect of prohibited contract
- 4.2 Earning a livelihood
- 4.3 Instituting and defending legal proceedings
 - 4.3.1 Proceedings which may be brought/defended personally by insolvent
 - 4.3.2 Security for costs
 - 4.3.3 Entitlement to costs
- 4.4 Holding office

Sequestration of a debtor's estate imposes on him a form of reduction in status (*capitis diminutio*) (*Spencer v Standard Building Society* 1931 TPD 481 484), which limits his capacity to contract, earn a living, litigate and hold office. This chapter considers these consequences of a sequestration order. Chapters 5 and 6 that follow deal with the effect of a sequestration order on the debtor's property and on that of his or her spouse. And chapter 7 considers how sequestration affects uncompleted contracts and unfinished legal proceedings to which the debtor is a party.

4.1 Contracting

The Insolvency Act does not deprive the debtor of his contractual capacity generally (*MacKay v Fey NO* 2006 (3) SA 182 (SCA)). So he retains a general competency to make binding agreements (cf s 23(2)). At the same time, to protect creditors, the Act imposes certain restrictions on the debtor's capacity to contract.

4.1.1 Prohibited contracts

The debtor may not make a contract which purports to dispose of any property of his insolvent estate (s 23(2)). And without the trustee's written consent, the debtor may not conclude a contract that adversely affects (or probably will adversely affect) his estate or any contribution that he is obliged to make towards his estate (*ibid*).

The contribution referred to here is the one claimable by the trustee under s 23(5) from moneys earned by the insolvent in the course of his profession, occupation or employment (see 5.3.2). The contribution becomes due to the trustee only once the

Page 78

Master has expressed the opinion that these moneys are not necessary for the support of the insolvent and his dependants.

Before the Master assesses a contribution, the insolvent therefore need not obtain the trustee's consent to contract. In *Mervis Brothers (Pty) Ltd v Hanekom* 1963 (2) SA 125 (T), M sued H, an insolvent, for a debt incurred before sequestration. The action rested on an undertaking given by H after sequestration that he would pay the full amount of the debt to M. The trustee had not consented to H's giving this undertaking. The magistrate's court held that the undertaking probably would adversely affect any contribution that H would have to make if called upon to do

so and, without the trustee's consent, it was not binding. On appeal, the court held that as the Master had not assessed a contribution, H was not obliged to contribute at the time of contracting. So the trustee's consent had not been required, and H's undertaking was binding.

If a person alleges that a particular contract with an insolvent is invalid for any reason, he must set out the facts on which he bases his allegation (*Cowan v Toffee* 1947 (2) SA 1148 (T)).

4.1.2 Effect of contract which is not prohibited

The contract is valid and binding on the parties where the trustee's consent is unnecessary or where it is given (s 23(2)). However, according to *De Polo & another v Dreyer & others* 1991 (2) SA 164 (W), although the contract is binding, the insolvent may not enforce performance in his favour unless the Insolvency Act (or some other statute) specifically gives him the right to do so. In the absence of an empowering statutory provision, the trustee is the proper person to enforce the claim. So, for example, the insolvent cannot compel payment of money due under a post-sequestration partnership concluded with the trustee's consent because no statutory provision entitles him to recover for his own benefit money due under a partnership. Only the trustee may demand this payment (*De Polo & another v Dreyer & others (supra)*). On the other hand, the insolvent may enforce payment for work done after sequestration because s 23(9) expressly gives him the right to recover this remuneration for his own benefit (cf *Ex parte Van Rensburg* 1946 OPD 64). In *De Polo's* case, Morris AJ explained the principle as follows (*idem* 176):

'[T]he mere fact that an insolvent can enter into a contract does not have the consequence that he is entitled to sue on that contract for his own benefit. That follows from the proposition that all assets, whether pre-existing or after acquired, fall within the estate and vest in the trustee. Where s 23(6) refers to a claim due to him under this section, in my

opinion it refers to the succeeding subsections which . . . refer to the insolvent being entitled to sue "for his own benefit". That expression occurs in all three subsections and those, it seems to me, are the circumstances where a claim is due to him under the section. There is no *nexus* between the right to enter into a contract and the entitlement to receive the benefit of that contract adversely to the estate. There may be circumstances in which an insolvent can enforce a contract which he has entered into, but if it comes to claiming benefits, whether in the form of assets or money accruing under that contract, I find nothing in the Act which entitles the insolvent to sue in his own name and for his own benefit. . . . Had the Legislature intended that the insolvent could recover the benefits of the contract without reference to the trustee and for his own benefit, then that could have been stated in s 23(2) in words similar to those appearing in ss (7), (8) and (9).'

Page 79

The contractual rights which the insolvent is specifically empowered to enforce for his own benefit under s 23(7) to (9) are set out below (4.3.1).

4.1.3 Effect of prohibited contract

If the insolvent enters into a contract which purports to dispose of estate property, the contract is voidable at the option of the trustee; it is not void (*W L Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T); *Mackay v Fey NO & another* 2006 (3) SA 182 (SCA) 188). The position is the same if the insolvent contracts without obtaining his trustee's consent where it is required (*Ex parte Olivier* 1948 (2) SA 545 (C)). Assets that the insolvent acquires, and liabilities that he incurs, under the contract are his own, and he may thus acquire an estate adversely to the trustee (*Ex parte Moolman NO* 1943 TPD 258). Should the trustee choose not to set aside the contract or simply stand by without voiding it, the contract remains binding upon the parties (*Ex parte Olivier (supra)* 549). However, as in the case of a contract which does not require consent or to which consent has been given, the insolvent cannot sue for performance unless a statutory provision gives him the right

to enforce for his own benefit the performance under that type of contract (cf *De Polo & another v Dreyer & others* 1991 (2) SA 164 (W)).

If the trustee chooses to set aside a contract, he may recover any performance made by the insolvent. Yet the trustee must also restore to the third party any benefits that the insolvent has received under the transaction (*Estate Louw v Credit Corporation of SA Ltd* 1956 (3) SA 303 (C)): here 'the appropriate remedy is *restitutio in integrum*' (return to the earlier legal position) (*Mackay v Fey NO & another (supra)* 188).

Section 24(1) provides some protection to third parties who contract with the debtor, unaware that he is insolvent. The section states that if an insolvent purports to alienate for valuable consideration and without the consent of the trustee property, or any right to property, which the insolvent acquired *after* the sequestration of his estate (and which thus became part of the estate), to a person who proves that he was not aware and had no reason to suspect that the estate of the insolvent was under sequestration, the alienation is still valid. The following should be noted in this regard:

- The section applies only to *new* assets which came into the insolvent's possession after sequestration and not to assets acquired by the insolvent in exchange for, or in replacement of, property in the estate at the time of sequestration. In *Wessels v De Klerk & another* 1960 (4) SA 310 (T), the insolvent sold immovable property that formed part of his insolvent estate at the time of sequestration and he received two promissory notes in part payment of the purchase price. He later endorsed the notes to a *bona fide* purchaser. The court held that the sale of the notes was not validated by s 24(1) and was thus voidable at the option of the trustee.

- The section places the onus upon the third party to prove that when he received the property in question, he was neither aware, nor had any reason to suspect, that the debtor was an insolvent. It is not enough for the third party to show that he had no reasonable ground to suspect insolvency; he must go further and establish that he had no reason at all to suspect it (*Fey NO & another v Mackay* [2004] 4 All SA 50 (C) 54).

4.2 Earning a livelihood

It is in nobody's interest that the insolvent or his dependants should be rendered destitute. So he is allowed to follow any profession or occupation or enter into any employment (s 23(3)), and he may make whatever contracts are reasonably necessary for this purpose (cf *George v Lewe* 1935 AD 249). But he may not, without his trustee's written consent, carry on, be employed in any capacity in, or have any direct or indirect interest in, the business of a trader who is a general dealer or a manufacturer (s 23(3)). The trustee must decide for himself whether to consent and in this regard must not follow the creditors' instructions, as the determination does not concern the administration of the insolvent estate (*A J Ferreira Beleggings (Edms) Bpk v Swart* 1969 (2) SA 170 (E) 173).

The term 'trader' is widely defined in the Act (s 2; *S v Moll* 1988 (3) SA 236 (T) 243). The term includes, among others, any person who carries on any trade, business or undertaking in which property (movable or immovable) is sold, or is bought, exchanged or manufactured for the purpose of sale or exchange, or in which building operations of whatever nature are performed. Neither 'general dealer'

nor 'manufacturer' is defined in the Act. The definition of 'trader' in s 2 expressly excludes farming operations. The definition has also been restrictively interpreted. A milk depot selling only milk has been held not to be a general dealer for these purposes (*Ex parte Du Plessis* 1957 (2) SA 253 (W)). The same conclusion was reached about a restaurant business (*R v Papangelis* 1960 (2) SA 309 (O)). In *S v Van der Merwe* 1980 (3) SA 406 (NC), the court, after considering the earlier cases, held that a 'general dealer' is someone who trades at a fixed and recognized place in all sorts of wares and not just in one kind or a few particular kinds. A trader who is neither a general dealer nor a manufacturer does not need his trustee's consent, and there are several anomalies (*A J Ferreira Beleggings (Edms) Bpk v Swart (supra)* 175). A 'manufacturer' is the owner or entrepreneur of a factory, responsible for manufacturing a manufactured object (*idem* 174), such as the person running a tailoring establishment in *Swart's* case.

A consent to trade in a particular business does not entitle the insolvent to do anything besides trade in the manner specified in that type of business, so as, for example, to receive the benefit of donations received outside his trade (*Cilliers & others v Liebenberg & others* (1909) 26 SC 611). But the insolvent may make contracts reasonably incidental to the type of business (*Johannesburg Municipality v Davies* 1925 AD 395), including, apparently, a contract of partnership (*Priest v Charles* 1935 AD 147). It also seems that the insolvent who trades with his trustee's written consent must record his receipts and expenditure, that the trustee may claim any surplus unnecessary for supporting the insolvent and his dependants, and that the Master may issue a certificate about the amount the trustee may claim (*Rudolph v The Master & another* 1927 TPD 96; see 5.3.2).

If the insolvent pursues a vocation without obtaining consent where it is required, he commits a criminal offence (s 137(c)). He cannot escape liability by saying he did not know that consent was necessary (*R v Cassim* 1932 CPD 209). And any contracts he makes in the course of the unlawful vocation are voidable if the trustee so chooses (cf *Ex parte Olivier* 1948 (2) SA 545 (C)).

Should the trustee give or refuse his consent to carry on a trade, any of the creditors or the insolvent, as the case may be, may appeal to the Master, whose decision is final

(s 23(3)). A copy of any consent given must immediately be forwarded by the trustee to the Master (s 23(3)*bis*).

4.3 Instituting and defending legal proceedings

The fact that a person is insolvent does not necessarily prevent him from being a party to legal proceedings (*Grevler v Landsdown en 'n ander NNO* 1991 (3) SA 175 (T) 177).

4.3.1 Proceedings which may be brought/defended personally by insolvent

Under s 23(6) to (10), an insolvent may sue or be sued in his own name and without reference to the trustee of his estate, in these cases:

- if the matter relates to status, eg, divorce;
- if the matter relates to a right which does not affect the insolvent estate, such as a right to receive maintenance from the insolvent (*Weinberg v Weinberg* 1958 (2) SA 618 (C)) or not to be unlawfully dispossessed of property (*Marais v Engler Earthworks*

(Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais 1998 (2) SA 450 (E) 454);

- if the claim is to recover remuneration or reward for work done or professional services rendered by the insolvent or on his behalf after the sequestration of his estate;
- if the claim is for a pension to which he is entitled for services rendered;
- if the claim is for compensation for loss or damage that he has suffered through defamation or personal injury (the precise ambit of this claim is considered in chapter 5);
- if the matter concerns a delict committed by him after the sequestration of his estate.

Although the insolvent is, in general, divested of his estate, he retains a reversionary interest in it 'because of the possibility that a residue or surplus of realised assets over liabilities may, in terms of s 116 of the Act, accrue to him' (*Mookrey v Smith NO* 1987 (1) SA 332 (C) 335). So he may litigate to ensure that it is properly administered (*Kuper v Stern and Hewitt NO* 1941 WLD 1 3-4; *Swart v Starbuck & others* 2016 (5) SA 372 (SCA) 377). For instance, he may sue to recover or protect property which vests in the trustee if the latter refuses to take the necessary action (*Mears v Rissik, Mackenzie NO and Mears' Trustee* 1905 TS 303; *Nieuwoudt v The Master & others NNO* 1988 (4) SA 513 (A) 524-5 530; *Voget & others v Kleynhans* 2003 (2) SA 148 (C) 153-4; *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd & others* 2005 (1) SA 398 (C) 424-5; *National Director of Public Prosecutions v Ramlutchman* 2017 (1) SACR 343 (SCA) 348-9; *Mulaudzi v Old Mutual Assurance Company (South Africa) Ltd & others* 2017 (6) SA 90 (SCA) 98-9). He may also apply for an interdict to prohibit the trustee from realizing assets in the estate if those already sold have yielded enough funds to meet all

the claims proved by creditors (*Jacobs v Hessels* 1984 (3) SA 601 (T)). And the insolvent may sue the trustee for damages for any loss incurred because of his maladministration of the estate (*Ecker v Dean* 1940 AD 206).

The fact that the insolvent has a right to litigate in matters concerning the administration of the estate does not mean that he has a general right to prescribe how the estate should be administered. He may bring proceedings to interfere with the administration of the estate only if he suffers an injustice because of an

irregularity or a lack of good faith on the part of the trustee or creditors (*Jordaan v Richter en andere* 1981 (1) SA 490 (O)). This point is illustrated by *Kruger v Symington NO en andere* 1958 (2) SA 128 (O). The creditors had resolved to sell an asset in the estate at a price which, unbeknown to them at the time, was lower than the asset's real value. The court held that this fact was not, in itself, sufficient reason for attacking the resolution or prohibiting the sale. There was no sign that the resolution had been passed irregularly or that the creditors had acted in bad faith. (See also *Muller v De Wet NO & others* 1999 (2) SA 1024 (W).)

4.3.2 Security for costs

An insolvent who brings an action in the magistrate's court is obliged to give security for the costs of the action if the defendant requests it (Rule 62(1)(b) of the Magistrates' Courts Rules). If the insolvent does not give security when called upon by the defendant to do so, the latter may apply for the action to be dismissed (*ibid*). For proceedings in the High Court, the position is different. If the matter is one for which the Insolvency Act specifically gives the insolvent the

right to sue—such as a claim for remuneration for services rendered—he cannot be required to give security for costs, unless, perhaps, the failure of the action is a foregone conclusion and thus vexatious (*Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) 79; *Hobson NO v Abib* 1981 (1) SA 556 (N)). If the insolvent's right to sue does not flow from the Act—eg, where the matter concerns the general administration of the estate—the court may order him to furnish security if it considers that the action is reckless and vexatious (*Ecker v Dean* 1940 AD 206; *Director, Law Society of Cape of Good Hope v Budricks* [2000] 2 All SA 541 (SE) 544–5; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) 625). In deciding the latter question, the court will have regard to the prospects of the action succeeding, whether the action is one which the trustee or the creditors could have brought, and whether there has been previous litigation on the same subject matter (*Israel v Burger* 1961 (1) SA 827 (O)).

4.3.3 Entitlement to costs

If the insolvent sues or is sued personally in a matter in which he is entitled to litigate, and he obtains an award of costs in his favour, the judgment for costs belongs to him personally, and he may dispose of it as he likes (*Schoeman v Thompson* 1927 WLD 298). Damages for the trustee's maladministration accrue to the insolvent estate, but an award of costs against the trustee enures for the benefit of the insolvent (*Ecker v Dean* 1940 AD 206). In *Ecker's* case, it was held that if there was any shortfall in the amount recovered from the trustee in respect of costs, the deficiency should be taken from the damages paid to the estate.

4.4 Holding office

An unrehabilitated insolvent is disqualified from holding a large number of positions—so many, in fact, that only a few can be mentioned here:

- He cannot be appointed as a trustee in an insolvent estate (s 55(a) of the Insolvency Act), and if he is already a trustee when his estate is sequestrated, he must vacate his office (s 58(a)). Nor may he be a liquidator of a company or a close corporation (s 372(a) of the Companies Act 61 of 1973 and ss 372 and 373 of the 1973

Page 83

Companies Act, read with s 66(1) of the Close Corporations Act 69 of 1984, read with Schedule 5, item 9 of the Companies Act 71 of 2008). The insolvent is also disqualified from being a business rescue practitioner (s 138(1)(d) of the 2008 Companies Act).

- He is not capable of being a member of the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council (ss 47(1)(c), 62, 106(1)(c) and 158(1)(c) of the Constitution of the Republic of South Africa, 1996), or of the National House of Traditional Leaders (s 5(c) of the National House of Traditional Leaders Act 22 of 2009).
- Unless granted an exemption by the court, he is disqualified from being a company director (s 69(8)(b)(i) and (11) of the Companies Act 71 of 2008). Under the previous 1973 Companies Act, the courts allowed an unrehabilitated insolvent to become a company director only if there was no danger to the private interests of the members or to the public who might be injured by dishonest trading (cf *Ex parte Harrod* 1954 (4) SA 28 (SR) 30; *Ex parte Dworsky* 1970 (2)

SA 293 (T)). One presumes that the same rule will apply under the 2008 Companies Act.

- Save with the authority of the court, he cannot take part in the management of a close corporation (s 47(1)(b)(i) of the Close Corporations Act 69 of 1984).
- He may not be a director of a co-operative (s 33(2)(b) of the Co-operatives Act 14 of 2005) or a mutual bank (s 38(b)(i) of the Mutual Banks Act 124 of 1993).
- He may not be registered as a credit provider, debt counsellor or payment distribution agent (s 46(2) of the National Credit Act 34 of 2005).
- He may not sit on the board of the Land and Agricultural Development Bank of South Africa (ss 1 and 10(e) of the Land and Agricultural Development Bank Act 15 of 2002).
- He may not be a member of the Legal Practice Council (ss 8(2)(a) and 11), the Legal Practitioners' Fidelity Fund Board (s 64(2)) or the National Forum on the Legal Profession (s 99(2)(a) of the Legal Practice Act 28 of 2014). In his application for enrolment as a legal practitioner (s 95(1)(k) and (t) read with ss 24(2)(d), 30(1)(a) and (b)(iii) of that Act), his supporting affidavit must, among other things, include confirmation that he is a fit and proper person to be admitted, including a statement about whether his estate has been sequestrated, provisionally or finally, or whether there is any application for the sequestration of his estate which is pending; and where his estate has been sequestrated, he must state whether he has been rehabilitated (Rule 17.2.14.3 of the South African Legal Practice Council, *Government Gazette* No. 4178177 of 20 July 2018). If he is a legal practitioner who handles trust moneys (s 84 of the Legal Practice Act), further rules apply if he becomes insolvent (ss 90(1)(b) and 84(1)). Then

the Legal Practice Council, the Legal Practitioners' Fidelity Fund Board or any person having an interest in the trust account of that legal practitioner or trust account practice may apply to the High Court for the appointment of a *curator bonis* (s 90(1)). The High Court appoints the *curator bonis* to control and manage the legal practitioner's account, with any rights, powers and functions as the court may consider fit (*ibid*).

- If he is a property practitioner and commits an act of insolvency or is insolvent, he is immediately disqualified from holding a Fidelity Fund certificate (s 59(1)(a)–(b) of the Property Practitioners Act 22 of 2019, with effect from 1 February 2022). (The Property Practitioners Act repealed the Estate Agency Affairs Act 112 of 1976 (s 76

Page 84

of the 2019 Act), and estate agents have undergone a name change.) He must then take the required steps within 30 days (s 59(1)(i)–(vii)). These steps include informing the necessary persons, stopping work as a property practitioner, handing over the administration of his trust account to the Property Practitioners Regulatory Authority, and seeing to it that his outstanding matters in consultation with any affected person are taken over by another property practitioner.

- He cannot be a registered manufacturer or distributor of liquor (s 11(2)(b) of the Liquor Act 59 of 2003). The trustee of his insolvent estate may continue the registered activities in the name of the estate or propose to the Minister that the registration be transferred to another qualified person (s 17(1) and (2); s 1 *sv* 'Minister').

- He cannot act as a sheriff because, as an insolvent, he cannot be issued a Fidelity Fund certificate (ss 30(1) (a) and 33(1)(c) of the Sheriffs Act 90 of 1986). Nor may he register as a debt collector (s 10(1)(a)(v) of the Debt Collectors Act 114 of 1998).
- He cannot be a dealer in second-hand goods, a pawnbroker or a scrap-metal dealer (ss 1 'dealer' and 14(1)(c) of the Second-Hand Goods Act 6 of 2009).
- The sequestration of his estate does not automatically terminate his office as the executor of a deceased estate, provided he can otherwise perform his duties (s 23 of the Administration of Estates Act 66 of 1965; *Trustees of Wright v Executors of Wright* (1872) 2 Roscoe 84). The same applies to his tutorship or curatorship (*De Villiers, Tutor v Stuckeris* (1829) 1 Menz 377). But he faces the termination of his office if he does not lodge sufficient security with the Master on written notice (s 77(3) of the Administration of Estates Act).
- If he is the trustee of a trust, the Master may remove him from office (s 20(2)(c) of the Trust Property Control Act 57 of 1988; cf *Sinclair v Meintjes* (1874) 4 Buch 40). Sequestration of his estate will, in any event, terminate his trusteeship if the trust deed contains a provision to this effect.
- In total, he may not be a member of 133 statutory councils, boards or bodies (see Roestoff (2018) 81 *THRHR* 393 402).
- These disqualifications and restrictions may need to be reconsidered in the light of the constitutional right to freedom of trade, occupation and profession, under which '[e]very citizen has the right to choose their trade, occupation or profession freely' (s 22 of the Constitution of the Republic of South Africa, 1996). This broad provision is limited, though, by the words: 'The practice of a trade, occupation or profession may

be regulated by law' (*ibid*). If a relevant disqualification or restriction is challenged, conceivably the justification under s 36 of the Constitution will be that the provision is intended to protect the public from dealing with insolvents. The underlying attitude is that insolvents are considered untrustworthy. This prejudice may, perhaps, be softened by consulting the corresponding position in some other legal systems (see Roestoff (2018) 81 *THRHR* 403ff).

Chapter 5

Vesting of the assets of the insolvent

Synopsis

- 5.1 Vesting of estate in trustee
- 5.2 Property which falls into estate
- 5.3 Property which does not fall into estate
 - 5.3.1 Wearing apparel, bedding, etc
 - 5.3.2 Remuneration for work done
 - 5.3.3 Pension
 - 5.3.4 Compensation for defamation or personal injury
 - 5.3.5 Compensation for occupational injuries or diseases
 - 5.3.6 Benefits payable to miner
 - 5.3.7 Unemployment insurance benefits
 - 5.3.8 Insurance policies
 - 5.3.9 Share in accrual
 - 5.3.10 Trust property/funds
 - 5.3.11 Right of labour tenant to land or right in land
 - 5.3.12 Friendly society moneys and assets
 - 5.3.13 Property acquired with money from above sources
- 5.4 Disposal of estate property by insolvent
- 5.5 Acquisition of new estate during insolvency

5.1 Vesting of estate in trustee

The trustee's function is to collect the assets in the estate, realize them, and distribute the proceeds among creditors in the order of preference set by the Act (*Hobson NO v Abib* 1981 (1) SA 556 (N) 559–60). To enable the trustee to do this, the Act provides that the effect of a sequestration order (including a provisional order: see s 2) is to divest the insolvent of his estate and vest it in the Master and later in the trustee once he has been appointed (s 20(1)(a)). The vesting occurs even in respect of property which has been sold in execution if the debtor's estate is sequestrated before the delivery or transfer of the property concerned (*Simpson v Klein NO & others* 1987 (1) SA 405 (W) 412; *Syfrets Bank Ltd & others v Sheriff of the Supreme Court, Durban Central, & another; Schoerie NO v Syfrets Bank Ltd & others* 1997 (1) SA 764 (D) 772–8; *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 154). Once the vesting occurs, the trustee, not the insolvent, litigates in relation to the insolvent estate (*Mulaudzi v Old Mutual Assurance Company (South Africa) Ltd & others* 2017 (6) SA 90 (SCA) 98). The trustee has no beneficial interest in the estate property (*Thorne &*

Another NNO v Receiver of Revenue 1976 (2) SA 50 (C) 52). If a provisional trustee is appointed, the estate vests in him before vesting in the trustee (cf s 54(5)).

The estate remains vested in the trustee until:

- the discharge of the sequestration order by the court (*Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 241); or
- the acceptance by creditors of an offer of composition made by the insolvent which provides that the insolvent's property will be restored to him (see 18.4.2); or

- an order for the insolvent's rehabilitation is granted under s 124(3) (see 19.2.1(iii)).

If a trustee vacates his office, is removed from office, or dies, the estate reverts in the Master until a new trustee is appointed (s 25(2)). If there is a co-trustee, the estate remains vested in him (*ibid*).

5.2 Property which falls into estate

Subject to certain exceptions flowing from the Act and from other enactments, the insolvent estate consists of the following:

- all property of the insolvent at the date of sequestration, including property (or its proceeds) in the hands of a sheriff under a writ of attachment; and
- all property which the insolvent acquires, or which accrues to him during the sequestration (s 20(2)), including any property that the insolvent recovers for the benefit of the estate where the trustee fails to take the necessary action (*Voget & others v Kleynhans* 2003 (2) SA 148 (C) 154).

Under s 2, 'property' means movable or immovable property wherever situate in the Republic, and includes contingent interests in property, other than the contingent interests of a fideicommissary heir or legatee. 'Immovable property' is defined as land and every right or interest in land or minerals which is registrable in a deeds registry within the Republic (*ibid*). By 'movable property' is meant every kind of property and every right or interest which is not immovable property (*ibid*). Movable property includes a liquor licence (s 118(1)(a) of the Liquor Act 27 of 1989) and a right of action, other than one that the insolvent may enforce personally (on which, see 4.3.1) (*Van Niekerk v Bayer Suid-Afrika (Edms) Bpk* [1998] 4 All SA 212 (NC) 224; *Voget & others v Kleynhans (supra)* 152).

Besides the items mentioned, the extensive list of types of property that vest in the trustee includes

- foreign assets,
- the solvent spouse's property,
- the insolvent's title deeds and his books of account,
- money,
- the proceeds of an execution sale held by an execution officer,
- the goodwill of the insolvent's business,
- intellectual property rights,
- debts owed to the insolvent during sequestration,
- shares,
- property that the insolvent has bought but not yet paid for,
- property acquired during sequestration,
- rights of inheritance, and

Page 87

- a claim for damages against the trustee for maladministration (see Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 10 ed (2019) para 9.5).

Some of these types of property will now be discussed in more detail.

As a rule, property situated outside the Republic is not included in the insolvent estate. The exception is movable property, situated in a foreign jurisdiction, that the insolvent owns when his estate is sequestrated or that he acquires afterwards during the sequestration, provided that at either of the relevant times he is domiciled in the jurisdictional area of the court that sequestrates the estate (*Fey & others v Mackay* [2004] 4 All SA 50 (C) 53; Kunst, Borraine and Burdette *Meskin's Insolvency Law* para 5.2). The trustee still needs to seek recognition from the relevant foreign

court to administer that foreign property (*Herman NO v Tebb* 1929 CPD 65). For more on cross-border insolvency, see chapter 29.

If, contrary to the Insolvency Act, a sale in execution of a magistrate's court judgment was held and the movable property was delivered, or the immovable property was transferred, the trustee claiming this property must prove that the purchaser acted in bad faith, knowing that the sale was wrongful (s 70 of the Magistrates' Courts Act 32 of 1994). Once the sheriff becomes aware that the debtor's estate has been sequestrated, execution is stayed (s 20(1) (a) of the Insolvency Act; *Huysamen v Absa Bank Ltd* 2020 JDR 2095 (SCA) para 18). Ownership of immovable property sold in execution but not yet transferred vests in the insolvent's estate (*Fourie & another NNO v Edkins* 2013 (6) SA 576 (SCA) 580–1; *Huysamen v Absa Bank Ltd* (*supra*)). The purchaser may request a court order under s 20(1)(c) directing the Registrar of Deeds to transfer the property into the purchaser's name, but this would be granted to a single creditor only in exceptional circumstances and if it were in the interests of the general body of creditors.

Immovable property registered in the insolvent's name passes to the trustee of the insolvent estate (*Harris v Trustee of Buissinne* (1840) 2 Menz 105), even if the seller could have reclaimed the property under s 28(1) of the Alienation of Land Act 68 of 1981 if sequestration had not occurred (*Brits & another v Eaton NO & others* 1984 (4) SA 728 (T)). The word 'owner' in the Sectional Titles Schemes Management Act 8 of 2011, effective from 7 October 2016, in relation to a unit, section, or an undivided share in the common property forming part of that unit, means the person in whose name the unit is registered at a deeds registry under the Sectional Titles Act 95 of 1986 or in whom ownership is vested by statute, including (among

others) the trustee in an insolvent estate and the liquidator of a company or close corporation which is an owner. In *Willow Waters Homeowners Association (Pty) Ltd v Koka NO & others* 2015 (5) SA 304 (SCA) 310–12 316, a registered title deed condition prohibited transfer without the homeowners' association's consent in a clearance certificate. This was held to be a real right enforceable against the trustees of property owners in sequestration (see also *Cowin NO & others v Kyalami Estate Homeowners Association & others* [2015] JOL 33745 (SCA)). In addition, the trustees vested with the insolvent's residence may successfully resist his attempt to rely on the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (*Botha NO v Kies* 2014 JDR 1932 (GP)).

Whenever an insolvent has acquired possession of property that the trustee claims, it is deemed to belong to the insolvent estate unless the contrary is proved (s 24(2)).

Page 88

But if a person who became a creditor of the insolvent *after* sequestration alleges that a particular asset does not belong to the estate and he claims a right to the asset, it is deemed *not* to belong to the estate unless the contrary is proved (*ibid*).

Sequestration of a joint estate makes both spouses 'insolvent debtors' for the purposes of the Act. As a result, the property of both of them (consisting of their shares in the joint estate as well as their separately owned property) vests in the trustee and is available to meet the claims of creditors (*Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA) 676; *Wentzel v Discovery Life Ltd & others* 2021 (6) SA 437 (SCA) 441–2; cf *Berrange NO v Hassan & another* 2009 (2) SA 339 (N) 369). So property inherited by a spouse in a marriage in community of property forms part

of the insolvent estate, even if a provision in the will specifically excludes the property from any community of property (*Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N)).

Property inherited by an insolvent during his insolvency falls into his insolvent estate, despite a contrary provision in the testator's will (*Vorster v Steyn NO en andere* 1981 (2) SA 831 (O)). But if an insolvent refuses to accept property bequeathed to him or an insurance benefit of which he has been nominated as a beneficiary, the property or benefit in question does not vest in his estate. The reason is that the insolvent merely has a competence or power ('bevoegdheid') to accept the bequest or nomination, and he acquires no right to the property or benefit until he has accepted it (*Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA) 928). So, by repudiating a legacy, inheritance or insurance benefit, an insolvent may ensure that it passes to someone other than the trustee and the creditors of his insolvent estate.

The property of the spouse of the insolvent, where the marriage is out of community of property, also vests in the trustee of the insolvent estate until it is released by the trustee (s 21). The question of the vesting of the solvent spouse's property is dealt with in chapter 6.

Ex-spouses formerly married in community of property to each other each have undivided half-shares in the immovable property in the joint estate. If they have a divorce settlement order, each undivided half-share vests in the ex-spouse only once registered in the latter's name in the Deeds Registry (*Fischer v Ubomi Ushishi Trading CC & others* 2019 (2) SA 117 (SCA) 126–7, overruling *Corporate Liquidators (Pty) Ltd & another v Wiggill & others* 2007 (2) SA 520 (T)).

As regards intellectual property, the insolvent's books and documents on a computer hard drive belonging to someone else fall within s 69 of the Insolvency Act dealing with search warrants (*Le Roux & others v Viana NO & others* 2008 (2) SA 173 (SCA)). Judicial notice must be taken of technological advancements in electronic data creation, recording and storage since the Insolvency Act was passed (*idem* 175). Electronic data thus falls within the insolvent estate.

A bank client's right of action to claim a credit sum on his account is property under the Insolvency Act (*Herrigel NO v Bon Roads Construction Co (Pty) Ltd* 1980 (4) SA 669 (SWA)). If this credit was obtained by theft or fraud, or mistakenly paid to the client, the client lacks a valid title to that money and cannot claim against the bank for it (*Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA) 448–9). But if a fraudster persuades an investor to transfer money into the fraudster's account to prepare for

taking part in an illegal investment scheme, the investor has no claim for unjustified enrichment against the bank that has the account the fraudster's insolvency trustees control after the fraudster has been caught (*Trustees, Estate Whitehead v Dumas & another* 2013 (3) SA 331 (SCA)). Instead, the investor's claim is in delict against the insolvent estate because of the fraudster's misrepresentation. The *Dumas* appeal court distinguished the *Nissan* case on its facts. In *Nissan* the funds were paid into the wrong bank account, and the payee who withdrew the money knew that he had no claim to it, so in effect he stole it. But in *Dumas* the tainted investment transaction was still the basis (*causa*) for the investor's payment. The investor intended paying the fraudster and voluntarily paid

the money into the latter's bank account. It was irrelevant that the fraudster had solicited the payment by misrepresentation. The Supreme Court of Appeal has since emphasized that the *Dumas* fraudster had unfettered discretion regarding the funds deposited into his account (see *South African Reserve Bank v Leathern NO & others* 2021 (5) SA 543 (SCA) 553).

5.3 Property which does not fall into estate

5.3.1 Wearing apparel, bedding, etc

The insolvent may keep for his own use his wearing apparel and bedding, as well as such household furniture, tools and other means of subsistence as the creditors may (by resolution) determine (s 82(6)). The insolvent may renounce, in favour of his creditors, the protection from execution which the Act confers in respect of particular assets (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 125). But this renunciation has been disapproved in another court because the protection is intended to benefit debtors, their families and the public, and the protection cannot be waived (*Ex parte Kroese & another* 2015 (1) SA 405 (NWM), followed in *Ex parte Van Dyk* 2015 JDR 0667 (GP) paras 19–20).

5.3.2 Remuneration for work done

Section 23(9) provides that the insolvent may recover for his own benefit (ie, to the exclusion of the estate) the remuneration or reward for work done or professional services rendered by him, or on his behalf, after sequestration. This provision is qualified by s 23(5), which says that the trustee is entitled to any moneys which the insolvent has received (or will receive) in the course of his

profession, occupation or employment which, in the opinion of the Master, are not necessary for the support of the insolvent and his dependants. The combined effect of these two provisions is that the earnings which an insolvent receives for work done remain vested in him until the Master (on application by the trustee) has expressed an opinion that a portion of those earnings is unnecessary (*Ex parte Van Rensburg* 1946 OPD 64 70). Only if the Master expresses this opinion is the insolvent divested of the relevant portion of the earnings in favour of the trustee (*Miller v Janks* 1944 TPD 127 130). The Master's decision in this regard constitutes the exercise of a quasi-judicial or administrative discretion and so is reviewable under s 151 (*Ex parte Theron en 'n ander; Ex parte Smit; Ex parte Webster* 1999 (4) SA 136 (O) 139). To enable the trustee to place sufficient details before the Master to make an assessment, the Act requires the insolvent to record his earnings and furnish these records to the trustee on demand (see 14.6).

The trustee may obtain payment of that portion of the insolvent's wage or salary which the Master has determined unnecessary, simply by informing the insolvent's employer that he (the trustee) is entitled, under s 23(5), to part of the insolvent's remuneration (s 23(5)). And the trustee may recover any amount from the insolvent by writ of execution issued by the Registrar on production to him of a certificate by the Master stating the amount claimable (s 23(11)).

The Act does not set any time limit within which the trustee must take steps to have the insolvent divested of surplus income. The trustee may conceivably act at any time before rehabilitation. On the other hand, it is open to the insolvent, before or at the time of applying for rehabilitation, to approach the court for an order declaring

particular property to be his own (*Ponammal NO v Taylor NO & another* 1963 (2) SA 656 (N) 661–2).

The insolvent's right to earn and recover income relates only to *lawful* income. If the insolvent obtains income from an unlawful source, it is not excluded from his insolvent estate, and he cannot keep any of it for himself (*Singer NO v Weiss & another* 1992 (4) SA 362 (T)).

5.3.3 Pension

The insolvent may recover for his own benefit any pension to which he may be entitled for services rendered by him (s 23(7)). Several statutes exclude pensions from the insolvent estate. In each case, one must determine whether the legislature intended to exclude moneys that become payable to the insolvent after the sequestration date, or also to exclude moneys he has already been paid and still has at the sequestration date. Examples of the former type of provision are s 3 of the General Pensions Act 29 of 1979 (*Foit v FirstRand Bank Bpk* 2002 (5) SA 149 (T)) and s 37B of the Pension Funds Act 24 of 1956 (*M & another v Murray NO & others* 2020 (6) SA 55 (SCA) 61 67). An example of the more extensive protection of benefits 'payable or received' is s 23 of the Government Employees Pension Law, 1996.

5.3.4 Compensation for defamation or personal injury

Section 23(8) allows the insolvent to recover for his own benefit compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of defamation or personal injury (*Fairlie v Raubenheimer* 1935 AD 135 143). The term 'personal injury' here includes not only bodily injury but also injury to personality interests, ie, *iniuria* in the wide sense (*De Wet NO v Jurgens* 1970 (3) SA 38 (A)). In *Jurgens*, an

insolvent was held to be entitled to recover for her own benefit damages for *contumelia* (insult) and loss of *consortium* (marital companionship) arising from adultery committed by the defendant with the insolvent's husband. 'Loss or damage' means loss or damage for which damages would usually be recoverable (*Santam Versekeringsmaatskappy Bpk v Kruger* 1978 (3) SA 656 (A)). So an insolvent who has sustained bodily injury (whether before or after sequestration) may recover for his own benefit, to the exclusion of his trustee, not only so-called 'general damages' (eg, compensation for pain and suffering, loss of amenities and the like) but also 'special damages' (eg, medical expenses and other kindred expenses and loss of earnings) (*ibid*).

Before the *Santam* case (*supra*), the courts took the view that in an action for defamation, the right to recover compensation for damage to the insolvent *in his*

Page 91

business (ie, economic loss) vests in the trustee and that the insolvent may recover for his own benefit only in respect of the injury to his reputation (*Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W)). Since *Santam*, though, this distinction seems invalid.

It follows from s 23(8) that if the insolvent is awarded an amount of compensation for defamation or personal injury before sequestration, he may keep that amount as his own separate property (*Santam Ltd v Norman* 1996 (3) SA 502 (C)).

Under the proviso to s 23(8), the insolvent requires the leave of the court to institute an action against the trustee of his estate on the ground of malicious prosecution or defamation.

5.3.5 Compensation for occupational injuries or diseases

Compensation payable or already paid to an employee under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 would seem to be excluded from the insolvent estate on the basis that it is compensation for loss or damage suffered because of personal injury. Another possible ground for the exclusion is s 32(1)(b) of this 1993 Act, stating that compensation is not subject to attachment or any other form of execution by an order of the court.

5.3.6 Benefits payable to miner

The right of a miner to a benefit or a gratuity, or money paid to the miner as such, does not form part of his insolvent estate (s 131(1) of the Occupational Diseases in Mines and Works Act 78 of 1973).

5.3.7 Unemployment insurance benefits

Under s 33 of the Unemployment Insurance Act 63 of 2001, benefits to which an employee is entitled under the Act are not capable of being assigned or attached by any court order, except one relating to the maintenance of the dependants (including the former spouse) of that employee. It may perhaps be argued on the basis of this provision that benefits under the Act do not vest in the employee's insolvent estate (the matter is not free from doubt).

5.3.8 Insurance policies

(i) Policies covering liability to third parties

If, before sequestration, the insolvent was insured against liability to third persons and incurred a liability covered by the policy, his rights against the insurer pass, upon sequestration, to the third person and not the insolvent

estate. Under s 156 of the Insolvency Act, the third person is entitled to recover directly from the insurer the amount of the insolvent's liability, but not more than the maximum amount for which the insurer has bound himself to indemnify the insolvent. The third party, being vested with the insolvent's rights, may proceed directly against the insurer and need not first obtain judgment against the insolvent estate or enter into an agreement with the trustee about the claim (*Gypsum Industries Ltd v Standard General Insurance Co Ltd* 1991 (1) SA 718 (W)).

The following should be noted regarding s 156:

- The section applies if the insolvent insured himself against liability to third persons and also if another person took out a policy extending this cover to the insolvent. The section merely requires that the insurer must be contractually bound to indemnify the insolvent; it does not matter whether this is because of a contract between the insurer and the insolvent, or one between the insurer and someone else (*Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) 26). In *Unitrans*, the court accepted that the section applied if the insolvent enjoyed insurance cover under an extension clause in another party's policy.
- The section is restricted to insurance against liability to third parties under a policy of indemnity insurance (*Venfin Investments (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins* [2011] 4 All SA 369 (SCA) 383–4). So the section does not apply, for example, if the policy obliges the insurer to compensate the insolvent only for damage to property (*Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 (1) SA 410 (A)).

- The section does not give the third person greater rights against the insurer than the insolvent had under the policy. So the insurer may refuse to compensate the third party beyond the maximum amount set in the policy (*Coetzee v Attorneys' Insurance Indemnity Fund* 2003 (1) SA 1 (SCA) 8). The insurer may also resist the third party's claim by showing that the insurance contract is not enforceable (*Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd* 1989 (2) SA 790 (W) 794), or by invoking a defence which the insurer had against the insured (*Przybylak v Santam Insurance Ltd* 1992 (1) SA 588 (C) 602). Examples of the insurer's resistance would be proving that the liability to the third party is of a kind which falls outside the ambit of the policy (*Canadian Superior Oil Ltd v Concord Insurance Co Ltd (formerly INA Insurance Co Ltd)* 1992 (4) SA 263 (W)), or that the insolvent failed to observe a policy provision requiring him to forward to the insurer any notice of a claim or legal process issued against him (*Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 (4) SA 1035 (SCA)).
- The section applies to companies or close corporations being wound up and unable to pay their debts (s 339 of the Companies Act 61 of 1973 and s 66(1) of the Close Corporations Act 69 of 1984 read together with s 339 of the Companies Act 1973 and Schedule 5, item 9 of the Companies Act 71 of 2008: *Van Reenen v Santam Ltd* 2013 (5) SA 595 (SCA) 599).
- The insolvent's existing rights are not transferred to or vested in the third party; no statutory cession occurs. Instead, s 156 creates a new, distinct cause of action for the third party to recover what the insurer owes the insured under the insurance contract. The third party must prove that the insured had incurred a liability to the third party, that the insurer was

contractually obliged to indemnify the insured in respect of that liability, and the amount that the insurer would have been obliged to pay the insured. The claim arises 'on the sequestration of the insured' (s 156)—the date of sequestration or winding-up by court order—and prescribes three years from that date (*Van Reenen v Santam Ltd (supra)* 599–601).

(ii) Life policies etc

Section 63(1) of the Long-term Insurance Act 52 of 1998 excludes certain insurance benefits from the insolvent estate:

Page 93

- the policy benefits provided (or to be provided) to the insolvent under an assistance, life, disability or health policy (or a number of such policies), which has been in force for at least three years and in which the insolvent or his (or her) spouse is the life insured (s 63(1)(a)); and
- any assets which the insolvent acquired solely with such policy benefits, within a period of five years from the date on which they were provided (s 63(2)).

Before s 63(2)(b) was amended with effect from 28 February 2014 (under the Financial Services Laws General Amendment Act 45 of 2001), the policy benefits or assets used to be excluded to an aggregate amount of R50 000 or such other amount as the Minister of Finance might prescribe. So, for example, if the insolvent was the named beneficiary of policies totalling R80 000, he used to be entitled to R50 000 and the remaining R30 000 used to be vested in his insolvent estate. From 28 February 2014, though, s 63(2) abolished the R50 000 limit, so s 63 now protects the total value of the protected policy and the protected assets. If, for example, the insolvent is the named

beneficiary of policies totalling R1 million, he is entitled to the entire R1 million. In addition, from 28 February 2014, the policy benefits are protected unless it can be shown that the policy was taken out with the intention to defraud creditors (s 63(4)).

Section 63(1) does not apply if the policy benefits are payable to a third person and not the insolvent. Then the right to the benefits vests in the third person (once he communicates his acceptance to the insurer). There is no question of those benefits becoming part of the insolvent estate (*Pieterse v Shrosbree NO & others; Shrosbree NO v Love & others* 2005 (1) SA 309 (SCA) 314; *Wentzel v Discovery Life Ltd & others* 2021 (6) SA 437 (SCA) 443–4). A life policy taken out by the insolvent in favour of a third person is an asset in the insolvent estate to the extent that the trustee is vested with any right that the insolvent had to surrender the policy before his death and obtain payment of the surrender value. Beyond this, though, the trustee has no claim in respect of the policy (*Warricker & another NNO v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W)).

The onus is on the insolvent to prove, on a balance of probabilities, that he is protected by s 63(1) (s 63(3)). The protection provided by the section is not available with regard to a debt secured by the policy (s 63(1)).

The Act also states that the policy benefits in question may not, during the lifetime of the life insured, be attached or subjected to execution under a judgment of a court (s 63(1)(i)). Nor may those benefits be used on the insolvent's death to pay his debts if he is survived by a spouse, child, stepchild or parent (s 63(1)(ii)).

5.3.9 Share in accrual

In a marriage which is subject to the accrual system, the spouse's right to share, under the Matrimonial Property Act 88 of 1984, in the accrual of the estate of the other spouse does not form part of the insolvent estate of the first spouse (s 3(2) of that Act). This accrual claim only arises upon the dissolution of the marriage (s 3(1)). Section 3(2) stipulates that the exclusion of this claim from the spouse's insolvent estate applies 'during the subsistence of the marriage'.

5.3.10 Trust property/funds

As a rule, money or property transferred to an agent to enable him to carry out his mandate falls into the insolvent estate of the agent. The position is different for trust property and funds:

- The assets of a duly constituted trust, although vesting in the trustee, do not form part of his personal estate on insolvency (s 12 of the Trust Property Control Act 57 of 1988).
- Money held in the trust account of a legal practitioner falls to be dealt with according to the provisions of s 84 and s 90 of the Legal Practice Act 28 of 2014, with effect from 1 November 2018 (see 4.4). Under s 90 of the Legal Practice Act, if a legal practitioner referred to in s 84(1) becomes insolvent, the High Court may, on application made by the Legal Practice Council, by the Legal Practitioners' Fidelity Fund Board or by any person having an interest in the trust account of that legal practitioner or trust account practice, appoint a *curator bonis* to control and administer that account, with any rights, powers and functions as the court may deem fit. Section 84 of the Legal Practice Act provides for the obligations of a

legal practitioner relating to the handling of trust moneys.

- The position is clearer regarding the insolvency or liquidation of a property practitioner (see 4.4). (These practitioners now do the work of what used to be called estate agents under the Estate Agency Affairs Act 112 of 1976.) Trust moneys in the trust account of such a property practitioner do not form part of the insolvent estate (s 59(4) of the Property Practitioners Act 22 of 2019, with effect from 1 February 2022). The word 'liquidation' in s 59(4) indicates that property practitioners may include natural persons and juristic persons (see also s 1 definition 'property practitioner').
- Similarly, the amount standing to the credit of a sheriff's trust account is excluded from his insolvent estate (s 22(3) of the Sheriffs Act 90 of 1986).
- Trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company does not form part of the assets or funds of that institution or company (s 4(5) of the Financial Institutions (Protection of Funds) Act 28 of 2001). For trust funds of a scheme such as a medical aid scheme to be treated separately from the other assets of the scheme and protected from the creditors of the scheme, there must be a trust relationship (*Genesis Medical Aid Scheme v Registrar, Medical Schemes & another* 2017 (6) SA 1 (CC) 17–18 18–19).
- Any issuance, deposit, withdrawal, transfer, attachment, pledge, cession *in securitatem debiti* or other instruction in respect of securities or an interest in securities that has become effective against third parties is effective against the insolvency administrator and creditors in any insolvency proceeding (s 46 of the Financial Markets Act 19 of

2012, with effect from 3 June 2013). For the purposes of Chapter IV in which s 46 appears, unless the context indicates otherwise, 'securities' means uncertificated securities, including money market securities (s 26 'definition'). An 'insolvency administrator' means a person authorized to administer an insolvency proceeding by a court or any national legislation, or the laws of a country other than the Republic (s 1 'insolvency administrator'). It includes a person authorized on an interim basis (*ibid*). And an 'insolvency proceeding' (as defined in s 1) means a judicial or administrative proceeding, or both, authorized in or by national legislation or the laws of a country

other than the Republic, including an interim proceeding, in which the assets and affairs of a person are subject to the control or supervision by a court or an insolvency administrator for the purpose of reorganization, business rescue, curatorship or liquidation, and includes, but is not limited to, any such proceeding under the Companies Act 71 of 2008, the Insolvency Act, the Banks Act 94 of 1990, the Financial Institutions (Protection of Funds) Act 28 of 2001, and the National Payment System Act 78 of 1998. (A cession *in securitatem debiti* (mentioned in the first sentence of this paragraph) is a contract by which a creditor of a right cedes that right to his own creditor as security for the debt owed to the latter until the debt so secured has been redeemed.)

5.3.11 Right of labour tenant to land or right in land

If the insolvent is a labour tenant and is entitled to apply for an award of land or a right in land under the Land Reform (Labour Tenants) Act 3 of 1996, his right in this regard does not form part of his insolvent estate (s 39(c) of that Act).

5.3.12 Friendly society moneys and assets

Moneys due as benefits under the rules of a friendly society to a member who retires having been a member for at least three years do not fall into his insolvent estate (s 48A(1) of the Friendly Societies Act 25 of 1956). But if the benefit has been pledged, only the amount by which the value of the benefit exceeds the secured liability is excluded from the estate (s 48A(2)).

5.3.13 Property acquired with money from above sources

Property acquired with money from any of the above sources does not vest in the trustee. This rule applies equally to property acquired with remuneration in respect of work done. The property, like the remuneration itself, is *prima facie* the property of the insolvent, and it remains so in the absence of any opinion by the Master that the remuneration, or part of it, was not necessary for the support of the insolvent or his dependants. In *Ex parte Fowler* 1937 TPD 353, the insolvent, after the sequestration of his estate, had lived frugally on his salary and had accumulated an estate consisting of, among other things, fixed property registered in his name. There was no evidence that the Master had at any stage considered whether there was a surplus of earnings above the amount necessary for the support of the insolvent and his dependants. The court, in rehabilitating the insolvent, held that the fixed property vested in him, and granted an order authorizing the Registrar of Deeds to endorse the title deeds to this effect.

5.4 Disposal of estate property by insolvent

An insolvent, for obvious reasons, cannot dispose of property that forms part of his insolvent estate, but the Act allows one exception to this rule. Under s 25(3), if the insolvent brings about any act of registration (transfer, mortgage, and so on) in respect of immovable property in his estate after the expiry of every *caveat* entered against that property by the Registrar of Deeds, the act of registration is valid. A *caveat*, as will be seen later (see 8.1), is a warning notice entered on the title deeds of the immovable property in the insolvent estate to prevent an insolvent from transferring the property or registering any right over it. The expiry of a *caveat* does not revert the property concerned in the insolvent. So, in principle,

Page 96

any transfer or other act of registration brought about after the expiry of the *caveat* would be void. Section 25(3), however, renders the transfer or other act of registration valid.

Under s 25(4), if an insolvent unlawfully disposes of immovable property or a right to immovable property which forms part of his insolvent estate, the trustee may, despite the provisions of s 25(3) (which, as we have seen, may render the disposal valid), recover compensation in respect of the property or right disposed of (*Motala & another NNO v Moller & others* 2014 (6) SA 223 (GJ) 231–2). The trustee is entitled to recover from:

- the insolvent personally;
- a person who acquired the property or right knowing it to be part of the insolvent estate; or

- a person who did not know that the property or right formed part of an insolvent estate, but who acquired it without giving sufficient value in return (s 25(4)).

The trustee may claim, in the first two instances, the value of the property or right and, in the last instance, the difference between the value of the property or right and whatever value the defendant gave in return (*ibid*).

So the trustee has two possible remedies where the insolvent disposes of immovable property or a right to immovable property forming part of the insolvent estate. The trustee may claim:

- the return of the property or right itself (on the basis that he is the owner or holder, and the disposal was invalid) (cf *Fey NO & another v Mackay* [2004] 4 All SA 50 (C); *MacKay v Fey NO & another* 2006 (3) SA 182 (SCA) 187), or
- compensation in respect of the property or right from the insolvent or the person who acquired it (on the basis of s 25(4)). The claim for return of the property or right is excluded, though, if the disposal occurred after all *caveats* entered against the property had expired.

5.5 Acquisition of new estate during insolvency

As various property does not vest in the trustee, clearly the insolvent may, during the period of his insolvency, acquire a new estate and hold it with a title adverse to his trustee. The courts have held that the after-acquired estate can, in turn, be sequestrated (see 1.3.1).

Chapter 6

Vesting of the assets of the solvent spouse

Synopsis

- 6.1 Vesting of assets in trustee
 - 6.1.1 Meaning of 'solvent spouse'
 - 6.1.2 Duty of solvent spouse to lodge statement of affairs
 - 6.1.3 Postponement of vesting
- 6.2 Release of solvent spouse's property by trustee
 - 6.2.1 Categories of property which must be released
 - 6.2.2 Onus of proof
 - 6.2.3 Procedure for release of property
 - 6.2.4 Effect of release by trustee
- 6.3 Release of property by court
- 6.4 Rights of solvent spouse's creditors in respect of property not released
- 6.5 Sequestration of solvent spouse's estate

6.1 Vesting of assets in trustee

Chapter 5 explained that a sequestration order vests the insolvent's property in the Master and later in the trustee, once appointed. Under s 21(1), the additional effect of a sequestration order—by definition including a provisional order: see s 2—is to vest the separate property of the spouse of the insolvent in the Master and later the trustee, as if it were the property of the insolvent estate, and to

empower the Master or trustee to deal with the property accordingly. Sequestration thus makes the trustee the owner of the solvent spouse's property just as it makes him the owner of the insolvent's property (*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) 15–16; *Harksen v Lane NO* 1998 (1) SA 300 (CC) 315). The transfer of ownership is not intended to be permanent since the solvent spouse may secure the release (and so regain ownership) of assets falling within the categories set out in s 21(2) (see below). But until an asset is released, the solvent spouse has none of the ordinary powers of ownership over it and cannot, for example, dispose of it or encumber it (*De Villiers NO v Delta Cables (Pty) Ltd (supra)* 16–17; *contra* the incorrectly decided *Motala & another NNO v Moller & others* 2014 (6) SA 223 (GJ), on which see Bertelsmann et al *Mars: The Law of Insolvency in South Africa* para 11.1n1).

Section 21 was introduced to prevent, or at least hamper, collusion between spouses to the detriment of creditors of the insolvent estate (*De Villiers NO v Delta Cables (Pty)*

Page 98

Ltd (supra) 13); in particular, to make it difficult for an insolvent and his spouse to deprive the estate of assets to which it is entitled by pretending that they are the solvent spouse's separate property. The section still performs this function (*Harksen v Lane NO & others (supra)* 317; *Janit v Van den Heever & another NNO (No 1)* 2001 (1) SA 731 (W) 733). Over the years, though, s 21 has also come to serve the wider purpose of aiding the trustee in deciding in all cases (ie, even where no collusion is present) which items of property possessed by the spouses belong to the insolvent estate. This is often a matter of complexity for the spouses themselves, so it is even more difficult and complex for a trustee who comes as a stranger to the spouses' financial affairs. In *Harksen v Lane NO & others*

(*supra*), it was argued that s 21 is invalid for violating the solvent spouse's constitutional rights, in particular, the right not to have property expropriated without compensation and the right to equality before the law and not to be unfairly discriminated against. The majority of the Constitutional Court rejected the argument. Its reasoning may be summarized as follows:

- The section cannot be regarded as expropriating the solvent spouse's property since it does not contemplate a permanent transfer of ownership to the Master or the trustee. The purpose of the section is merely to make sure that the insolvent estate is not deprived of property to which it is entitled.
- The section does indeed differentiate between the solvent spouse and other persons who might have had dealings with the insolvent. Yet this differentiation is legitimate and does not infringe the right to equality before the law because the section has a legitimate purpose, and the differentiation has a rational connection to that purpose.

The differentiation of the section amounts to discrimination, but it does not constitute *unfair* discrimination because

- it does not affect a vulnerable group or a group that has suffered discrimination in the past;
- it is intended to achieve a worthy and important societal goal: protecting the rights of creditors of insolvent estates; and
- it does not impair the fundamental dignity of solvent spouses or bring about an impairment of a comparably serious nature.

6.1.1 Meaning of 'solvent spouse'

For the purposes of s 21, 'spouse' has an extended meaning and includes a wife or a husband married according to any law or custom, and also a person living with a member of

the opposite sex, although not married to her or him (s 21(13)). Even so, according to *Chaplin NO v Gregory (or Wyld)* 1950 (3) SA 555 (C), on the insolvency of a married man or woman who is living with a third person (ie, not the legal spouse), only the property of the legal spouse, and not that of both the spouse and the third person, vests in the trustee.

Parties of the same sex who have concluded a 'civil union', as defined in the Civil Union Act 17 of 2006, qualify as spouses for the purposes of s 21 and are subject to its provisions. A civil union is a voluntary union of two persons who are both 18 years of age or older, which is solemnized and registered as a marriage or civil partnership in accordance with the procedures prescribed in the Act, to the exclusion, while it lasts, of all others (s 1 sv 'civil union'). The legal consequences of a marriage under the Marriage Act 25 of 1961 apply with the necessary contextual changes to a civil union (s 13(1) of

the Civil Union Act 17 of 2006), and, with certain exceptions, any reference to a husband, wife or spouse includes a civil union partner (s 13(2)).

Section 21 applies only if there is, indeed, a solvent spouse. If the joint estate of spouses married in community of property is sequestrated, both spouses become insolvents, and so s 21 does not apply. The property of these spouses vests in the trustee under s 20, including assets which a spouse owns as his or her separate property and which, therefore, do not form part of the joint estate (*Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N); *Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA) 675–6).

Section 21 contemplates an existing relationship between the spouses. If, before sequestration, the relationship has been ended (by death or divorce in a marriage, or by separation in an 'informal' relationship), then s 21 does not apply. It follows that the section does not apply to a previous spouse or to the surviving spouse in the case of the sequestration of a deceased estate (*Janit v Van den Heever & another NNO (No 1)* 2001 (1) SA 731 (W); *Shrosbree & others NNO v Van Rooyen NO & others* 2004 (1) SA 226 (SE) 229).

For the sake of brevity, in this chapter it is assumed that the solvent spouse is a woman.

6.1.2 Duty of solvent spouse to lodge statement of affairs

One of the sheriff's duties on receiving a sequestration order is to serve a copy of the order on the solvent spouse if she has a separate estate that has not been sequestrated (see 8.2). Within seven days of service, the solvent spouse must lodge with the Master a statement of her affairs as at the date of sequestration, framed substantially according to Form B in the First Schedule to the Act, and verified by affidavit (s 16(3)). The information that must appear in the statement of affairs is set out in chapter 2 on voluntary surrender. The Master will allow a reasonable fee for help in preparing the statement of affairs if he is satisfied that the solvent spouse could not prepare it without help (s 16(5)).

6.1.3 Postponement of vesting

The vesting of the solvent spouse's property in the trustee may have severe consequences for her. So the Act allows postponing the vesting of some or all of the solvent spouse's assets. Under s 21(10), if the solvent spouse is carrying on the business of a trader apart from the insolvent spouse, or if it appears to the court that the

solvent spouse is likely to suffer serious prejudice through the immediate vesting of her property, the court may, when making the sequestration order or at a later date, exclude her property or part of it from the operation of the order for such period as the court thinks fit. The court may only postpone the vesting of the solvent spouse's property if the court is satisfied that she is willing and able to make arrangements protecting the interest of the insolvent estate in the property concerned, and the court must make the postponement conditional upon the immediate completion of these arrangements (*ibid*).

To obtain a postponement, the solvent spouse must furnish the court with full details of the nature and value of the assets claimed, the nature and origin of her title to those assets, the prejudice that she will suffer if the postponement is refused, and the arrangements she intends and is able to make to safeguard the interest of the insolvent

estate (*Ex parte Vogt* 1936 SWA 39 41). The sort of contingencies against which the insolvent estate must be protected are alienation or fraudulent abandonment of the assets by the solvent spouse, malicious or accidental damage to the property by the solvent spouse or by a third person, and theft of the assets by a third person. In each case, the court will ask whether the solvent spouse's proposed arrangements offer adequate protection against all the contingencies that could possibly take place. Only if there is no reasonable possibility of a contingency occurring may it be left out of account (*Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N)).

6.2 Release of solvent spouse's property by trustee

6.2.1 Categories of property which must be released

The trustee must release the solvent spouse's property proved to fall into any of these categories:

(i) Property owned before marriage to the insolvent

The trustee must release property that was the solvent spouse's property immediately before her marriage to the insolvent, or before 1 October 1926 (s 21(2)(a)).

(ii) Property acquired under a marriage settlement

The trustee must also release property acquired by the solvent spouse under a marriage settlement (s 21(2)(b)). The solvent spouse need not prove that the settlement was in good faith. She would still have to prove this genuineness to avoid having the donation set aside as a disposition without value under s 27 (see 12.2.1(ii)). But s 27 and s 21 are independent of each other (*Dobrin v Trustees Estate Dobrin* 1932 WLD 195). In *Turnbull v Van Zyl* NO 1974 (1) SA 440 (C), it was pointed out that an antenuptial contract is interpreted according to the general rules of interpreting ordinary contracts and that if the terms of a donation in the contract are too uncertain to be enforced, the solvent spouse cannot rely on the donation to obtain the release of the property. The court held that a clause in an antenuptial contract settling upon the wife 'all household furniture and effects' was too vague to be enforced and so was not a valid ground for releasing the items claimed by the solvent spouse. On the interpretation of contracts, see the leading case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

(iii) Property acquired by valid title during the marriage

The trustee must release property which the solvent spouse acquired during her marriage with the insolvent by a valid title against creditors of the insolvent (s 21(2)(c)). This would include property bought by the solvent spouse from her own earnings or the proceeds of her personal property and donations she received from family and friends (cf *Bernard v Klein NO 1990 (2) SA 306 (W)*).

A donation between spouses, although formerly invalid, is now allowed (s 22 of the Matrimonial Property Act 88 of 1984) and so is enforceable, provided it is sufficiently certain and meets the formalities required by s 5 of the General Law Amendment Act 50 of 1956. (Under s 5 of that Act, an executory contract of donation—ie, one that has not been fully performed—must be embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two

Page 101

witnesses.) So, if the solvent spouse has acquired an asset from the insolvent as a direct gift or with money provided by the insolvent, she has acquired the asset with a title adverse to the insolvent's creditors, and the trustee must release it. The insolvent's donation with the specific purpose of shielding this asset from creditors and providing his wife with financial security does not affect the position (*Rens v Gutman NO & others 2003 (1) SA 93 (C) 98*). But the trustee may later institute proceedings under s 26 to have the gift set aside as being a disposition without value (see 12.2.1).

To provide the solvent spouse with a valid title, the transaction by which she acquired the property must have been genuine and concluded in good faith. If it was a

simulated or collusive transaction designed to deceive or defraud creditors, the trustee may disregard it (*Snyman v Rheeder* NO 1989 (4) SA 496 (T); *Jooste v De Witt* NO 1999 (2) SA 355 (T)). A key factor in determining the question of good faith is whether the parties, at the relevant time, were aware of the alienator's actual or imminent insolvency (*Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA) 917).

(iv) Property protected under certain other provisions

Section 21(2)(d) provides for the release of property protected by various other provisions, but it has become obsolete because the relevant provisions no longer exist. Section 44(1) and (2) of the Insurance Act 27 of 1943, protecting part of the value of specific life policies ceded to, or taken out in favour of, a solvent wife, was found to be unconstitutional and thus void (*Brink v Kitshoff* NO 1996 (4) SA 197 (CC)). The Insurance Act 27 of 1943 has now been replaced by the Long-term Insurance Act 52 of 1998, which has no provision like s 44.

(v) Property acquired with proceeds of the above

The trustee must also release property acquired with any of the property mentioned above or with its income or proceeds (s 21(2)(e)).

6.2.2 Onus of proof

The solvent spouse bears the onus of proving that the property she claims falls within a particular category (*Maudsley v Maudsley's Trustees* 1940 WLD 166 169). If the trustee raises pertinent issues pointing to possible collusion, and the solvent spouse does not genuinely try to address these issues or to reconstruct a true picture of the transaction, the court may find that she has not discharged

the onus resting upon her (cf *Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA)). On the other hand, if she gives a plausible explanation showing her title to the property and the trustee fails to deal specifically with her allegations or provide any contradictory evidence, she may be held to have discharged her onus. In *Bernard v Klein NO* 1990 (2) SA 306 (W), the solvent spouse supplied evidence to show that she had obtained the money to pay for the property in question from various sources, including the sale of her engagement ring and donations from her mother, father-in-law and brother-in-law. The trustee did not allege any facts to refute this evidence but simply said that he *suspected* that the solvent spouse had received money from the insolvent and that the solvent spouse's evidence was 'doubtful' and 'suspicious'. The court held that the solvent spouse's version of events, although it had some 'strange features', was acceptable in itself and, as it was the only version before the court, it had to be believed.

In *Sali-Ameen v Smit NO* 2009 JDR 1363 (GSJ) para 20, the solvent spouse claimed

Page 102

that the insolvent had donated a property to her ten years before his sequestration, intending it to be her asset. She explained that it was bought to compensate her for leaving her work and attending to bringing up the children and looking after the household. The court held that this plausible explanation had not been challenged by the trustee, and so the court was compelled to accept it. There is 'no principle that parties married out of community of property cannot support each other in the running of the family affairs and also each other's affairs during the marriage' (*Davies v Van den Heever NO* 2019 JDR 0536 (GJ) para 30; *Augustine v Haywood NO* 2019 JDR 2498 (LP) para 22). In discussing the convoluted facts of *Meyerowitz v*

Motsheka 2014 JDR 2456 (GJ), the court remarked that this was not a case of the insolvent's trying to protect his assets by transferring them to his wife (para 12.4.58). The family had co-operated during a crisis. The insolvent's contribution to paying the monthly bond instalments on the property did not detract from the fact that the solvent spouse was always intended to be the sole owner of the property.

6.2.3 Procedure for release of property

The Act does not stipulate which procedure must be followed to obtain the release of assets, but the solvent spouse must apply for this release (cf *Van Dyk v Donovan Theodore Majiedt Inc* 2021 JDR 2591 (FB) para 11). The practice is for the solvent spouse to apply to the trustee for the release of the property, but she need not take this course and may approach the court directly (*Hawkins v Cohen NO* 1994 (4) SA 23 (W)). When applying to the trustee, the solvent spouse is usually required to provide the trustee with an affidavit setting out the nature and origin of her title to the property and any documents supporting her allegations: invoices, receipts, paid cheques, and so on. Affidavits by third parties able to vouch for the genuineness of her claim may also be included. The trustee must bring his mind to bear on the claim and must consider any statements by third persons that the solvent spouse submits to establish it (*De Villiers v Estate De Villiers* 1930 CPD 387 388). If the solvent spouse proves (on a balance of probabilities) that an asset falls into one of the prescribed categories, the trustee must release it at once. He cannot refuse to do so because he may be entitled to set the transaction aside under another section of the Act (*Conrad v Conrad's Trustee* 1930 NPD 100). Nor has a creditor the power to intervene and prevent the trustee from releasing the asset (*Enyati Resources Ltd & another v Thorne NO & another* 1984 (2) SA 551 (C)).

If the vesting of certain assets has been postponed, the solvent spouse must, during the postponement, lay before the trustee evidence of her claim to the assets. The trustee must notify her in writing whether he will release them (s 21(10)).

6.2.4 Effect of release by trustee

Where the trustee has released the property to the solvent spouse, he is not debarred from proving later that it belongs to the insolvent estate and from recovering it accordingly (s 21(12)). And the court can, on application by the trustee or a creditor, grant an interdict prohibiting the solvent spouse from selling, mortgaging or otherwise disposing of the released property, pending an action to set aside the transaction under which the solvent spouse acquired the property (*Enyati Resources Ltd & another v Thorne NO & another* 1984 (2) SA 551 (C)).

Page 103

6.3 Release of property by court

Should the trustee refuse to release property claimed by the solvent spouse, she may apply to court for an order to release the property or stay the property's sale (s 21(4)). If the property has already been sold but its proceeds have not yet been distributed among creditors, the solvent spouse may ask for an order declaring that she is entitled to the proceeds (*ibid*). She may approach the court without first applying to the trustee, but this could have adverse cost implications for her (*Hawkins v Cohen NO* 1994 (4) SA 23 (W)). The court may make any order on the application it considers just (*ibid*). It will usually order the release of property that the solvent spouse proves falls within one of the prescribed categories, but it will consider each application on its merits and may, in exceptional

circumstances, apply some other principle, such as estoppel (*Van der Bergh v Insolvent Estate Van der Bergh* 1931 CPD 1). Section 21(12), allowing the trustee to recover property he has released to the solvent spouse, does not apply when the court has ordered the release of the property. In other words, once the court has made an order, the matter is *res judicata* between the parties (*Rautenbach v Morris: In re Estate Rautenbach* 1961 (3) SA 728 (E)).

6.4 Rights of solvent spouse's creditors in respect of property not released

The separate creditors for value of the solvent estate are entitled to prove their claims against the insolvent estate in the usual way (see 9.2.3). Having done so, they are entitled to share in the proceeds of the solvent spouse's property (ie, that not released) in priority to the separate creditors of the insolvent estate (s 21(5)). The solvent spouse's property must still bear a proportionate share of the costs of sequestration (*ibid*). The proof of claims by the solvent spouse's creditors does not entitle them to share in the separate assets of the insolvent estate or to vote at meetings of creditors (*ibid*).

If the trustee or the court has released any property of the solvent spouse, the latter's separate creditors are entitled to share in the proceeds of that property realized by the trustee only if they have excused the property released as well as any property acquired by the solvent spouse since the sequestration (s 21(6)). (Excussion is the seizure and sale of goods for debt.) Before awarding a creditor a share in the proceeds of the solvent spouse's assets, the trustee may require the creditor to lodge with him, within a period fixed by the Master, an affidavit, supported by any available evidence, setting forth the result of the excussion

and disclosing the balance of his claim which remains unpaid (s 21(7)). The creditor is then entitled to share in that balance only. At the same time, if he has incurred costs in excussing the separate property of the solvent spouse and has been unable to recover those costs from the proceeds of that property, he may add the amount of the costs to the amount of his claim as proved (*ibid*). If, during the period fixed by the Master, a creditor fails to excuss the property of the solvent spouse available to satisfy his claim, or fails to lodge the required affidavit, he loses all right to share in the proceeds of the solvent spouse's property, unless the court orders otherwise (s 21(8)).

6.5 Sequestration of solvent spouse's estate

The solvent spouse cannot surrender her estate while it vests in the trustee (*Ex parte Venter* 1931 SWA 3). At the same time, though, civil proceedings against her are not

Page 104

stayed (*Malcomess' Estate v De Kock* 1937 EDL 18), and if she commits an act of insolvency, her estate may be sequestrated by a creditor (*Mosenthal Bros Ltd & another v Moritz* 1929 WLD 84). The court may postpone the application for sequestration or make any interim order it considers just if it is satisfied that the act of insolvency was due to the vesting and either:

- proceedings are being or will be taken, where necessary, to obtain an order releasing the property, or
- property of the solvent spouse has been released since the making of the sequestration order and the solvent spouse is now able to discharge her liabilities (s 21(11)).

If the estate of the solvent spouse is sequestrated, the right to obtain the release of the property that belonged to her vests in the trustee of her estate (*Souter NO v Said NO* 1957 (3) SA 457 (W)).

Chapter 7

Uncompleted contracts and legal proceedings not yet finalized

- 7.1 Contract completed by insolvent but not by other party
- 7.2 Contract not completed by insolvent
 - 7.2.1 Continuance of contract at common law
 - 7.2.2 The trustee's election at common law
 - 7.2.3 Consequences of repudiating contract
 - 7.2.4 Consequences of abiding by contract
- 7.3 Purchase and sale of immovable property
 - 7.3.1 Sequestration of purchaser's estate
 - 7.3.2 Sequestration of seller's estate
- 7.4 Instalment agreement regarding movable goods
 - 7.4.1 Sequestration of buyer's estate
 - 7.4.2 Sequestration of seller's estate
- 7.5 Sale of movable property under a contract that is not an instalment sale
 - 7.5.1 Credit sale of movable property
 - 7.5.2 Cash sale of movable property
- 7.6 Lease
 - 7.6.1 Sequestration of lessor's estate
 - 7.6.2 Sequestration of lessee's estate
- 7.7 Employment contract
 - 7.7.1 Sequestration of employee's estate
 - 7.7.2 Sequestration of employer's estate
- 7.8 Transactions on market infrastructure

- 7.9 Agreements providing for termination and netting
- 7.10 Provisions designed to protect solvent party
 - 7.10.1 Clause reserving ownership in goods until full payment made
 - 7.10.2 Clause providing for cancellation on insolvency
 - 7.10.3 Clause providing for vesting or continued use of insolvent's property
 - 7.10.4 Clause providing for direct payment to subcontractors of insolvent
 - 7.10.5 Clause providing for set-off on insolvency
- 7.11 Legal proceedings commenced before insolvency

A sequestration order affects not only the insolvent's property but also the contracts to which he is a party and which have not been performed (apart from those contracts he

can enforce for his own benefit—see 4.3.1) and legal proceedings against him which have not been finalized.

7.1 Contract completed by insolvent but not by other party

If the insolvent has carried out his side of the contract and only the other party's performance is outstanding, the right to that performance is an asset in the insolvent estate and vests in the trustee. If the right is one to payment, the trustee may enforce it in the same way as other debts owed to the insolvent estate (cf s 77). If the right is to some other performance, the trustee may either sell the right along with the other estate assets or else enforce performance and then sell the subject matter of the performance.

Once the debtor's estate has been sequestrated, the insolvent estate is entitled to receive performance from debtors of the insolvent. This performance must therefore be directed to the trustee, not the insolvent. Performance to the insolvent is generally regarded as unlawful. But a right to a performance held by the estate lapses if the other party in good faith, and without knowledge of the sequestration, performs to the insolvent (s 22).

A right to compensation under an insurance policy indemnifying the insolvent against liability to third parties vests in the third party concerned, who may recover what the insolvent owes him directly from the insurer in terms of s 156. The nature of a third party's right under s 156 is discussed in 5.3.8(i).

7.2 Contract not completed by insolvent

The following principles apply to a contract which the insolvent has not performed (or performed in full) by the time of sequestration. First the general principles of the common law are stated, then the rules governing various specific contracts. These rules may consist of a mixture of statutory and common-law rules.

7.2.1 Continuance of contract at common law

(i) The general rule at common law

As a general rule at common law, sequestration does not suspend or put an end to the contract (*Bryant & Flanagan (Pty) Ltd v Muller & another NNO* 1978 (2) SA 807 (A) 812; *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) 192). This general rule is affected by exceptions and qualifications that derive from the common law, statute law, or a combination of the two.

The treatment of an uncompleted contract depends on three factors: the type of contract involved in the particular facts, the contracting party who is the insolvent and has not fully performed his obligations at the time when his estate is sequestrated, and the application of the relevant law to the facts. The application of the relevant law may itself consist of further steps. As an example, let us suppose that the trustee has identified the particular contract as a lease of immovable property, and the insolvent as the lessor (the landlord). Applying the law to the facts, the trustee follows the principle of 'huur gaat voor koop' when offering the let immovable property for sale (see 7.6.1 and 15.2.5). The process of applying the principle of 'huur gaat voor koop' may itself take several steps, the contract may or may not come to an end, and if it does come to an

end, then the lessee is entitled to claim damages from the insolvent estate. It is also noteworthy that in this instance, the relevant principles are derived from the common law, not the Insolvency Act. And it is also clear that the analysis of the contract involves a sequence of pigeonholing, in which progressive classification leads to the relevant law that must be applied to the facts.

There are two common-law exceptions to the general rule stated above that sequestration does not put an end to the contract. The law on mandate is debated; the law on partnership is much clearer.

(ii) One exception at common law: mandate

It has been held that a contract of mandate (*mandatum*), ie, an agreement to perform some task or render professional services for another, such as the contract between an attorney and his client, comes to an end by operation of law (*ipso iure*) on the insolvency of the

mandator (the principal) because the principal's status has changed (*Goodricke & Son v Auto Protection Insurance Co Ltd (in Liquidation)* 1968 (1) SA 717 (A) 722; see also *Gore & another NNO v Roma Agencies CC* 1998 (2) SA 518 (C) 521). However, this view is arguably an overgeneralization: the question in each case seems to be whether the mandate concerns a matter in which the principal can act without his trustee's concurrence (cf *Klein NO v South African Transport Services & others* 1992 (3) SA 509 (W) 513).

There is Roman-Dutch authority to the effect that an agreement of mandate terminates on the insolvency of the mandatary (agent) (Voet 17.2.17) but, again, this proposition probably needs to be qualified. For one thing, a mandate to perform a juristic act of some kind (eg, conclude a contract) logically should not terminate, since any juristic act performed by a mandatary is deemed to have been concluded between the mandator and the other person, and the mandatary is not a party to the resultant legal relationship. Secondly, if the mandate does not call for any special skill or expertise and, therefore, can be satisfactorily executed by the trustee (eg, by engaging the services of a person of the same profession or training as the insolvent), there seems to be no cogent reason for denying the trustee the option of enforcing the contract (cf *Natal Law Society v Stokes & another* 2002 (3) SA 189 (N) 196).

(iii) A further exception at common law: partnership

If one partner's estate is sequestrated, the partnership itself is terminated by operation of law (*South African Loan, Mortgage & Mercantile Agency Ltd v RC Birkett* (1885) 6 NLR 77 81; *Estate of Stoltenhoff v Howard* (1907) 24 SC 693 694). So is a partnership if its estate is sequestrated (*In re PD Johnson* (1885) 6 NLR 92; *Tobias & Co v Woolfe &*

Brown 1915 OPD 60; *Cassim v The Master & others* 1962 (4) SA 601 (N) 606).

7.2.2 The trustee's election at common law

At common law, the trustee (or provisional trustee) generally has an election (a choice) whether to perform in terms of the contract or not. It is sometimes said that the trustee is empowered by reason of his position to *terminate* the contract, but this expression is misleading: the only 'power' which the trustee's office gives him is to exclude the right of the other party to invoke the remedy of specific performance (*Smith & another v Parton* NO 1980 (3) SA 724 (D) 728–9; *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) 566–7; *Ellerine*

Page 108

Brothers (Pty) Ltd v McCarthy Ltd 2014 (4) SA 22 (SCA)). The trustee is given this power so that he may act in the interests of the *concursum creditorum* (*Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd (in Liquidation)* 1981 (1) SA 171 (A) 182; *Ellerine Brothers (Pty) Ltd v McCarthy Ltd (supra)* 26–7). It follows that he must obtain and abide by the instructions of the general body of creditors on the matter, and that he may not competently adopt a course that harms the interests of the *concursum creditorum* (*Uys & another v Sam Friedman Ltd* 1934 OPD 80 86; *Ward v Barrett* NO & *another* NO 1963 (2) SA 546 (A)).

The question whether the trustee has elected to abide by the contract is one of fact, not law. In each case, the question must be decided by a process of inference, the conclusion drawn to be consistent with all the proven facts. To the extent that the other party relies upon the trustee's

conduct as constituting an election to abide by the contract, that conduct must be unequivocal (*Du Plessis & another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) 364–5). So, for example, an election to continue with a building contract does not, in itself, entail an election to abide by executory subcontracts (*Du Plessis & another NNO v Rolfes Ltd (supra)*); a decision to continue with a contract of agency is not necessarily an election to complete the principal contract (*Gore & another NNO v Roma Agencies CC* 1998 (2) SA 518 (C)); and realizing property transferred to the estate in terms of the contract does not amount to an election to abide by the contract (*Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) 193).

Once the trustee has elected to repudiate or continue with the contract, he cannot change his mind (*Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) 95). If he does not reach a decision within a reasonable time, it is assumed that he does not intend to perform in terms of the contract. In *Tangney & others v Zive's Trustee* 1961 (1) SA 449 (W), the insolvent had bought a hotel business on instalments. The trustee carried on the business for more than six months but did not make any payments in terms of the contract or indicate in any other way his intention to affirm the contract. In response to a letter from the sellers giving notice of intention to cancel the contract, the trustee simply argued that the sellers were not entitled to cancel and that the notice was invalid. The court held that, as the trustee had failed to give due notice of his intention to abide by the contract, the sellers were entitled to assume that he had repudiated it. Further, if the trustee has not performed any contractual obligations that were due during this time, the other party to the contract is entitled to cancel it because of the trustee's breach (*Ellerine Brothers (Pty) Ltd v McCarthy Ltd (supra)*).

The trustee's power to repudiate is excluded where he obtains transfer of immovable property which the insolvent bought and resold (without receiving transfer) before sequestration. On receiving transfer, the trustee is obliged to pass transfer of the property to the purchaser against payment of the price, if not already paid. In other words, having elected to uphold and take transfer under the first contract, the trustee is not entitled to repudiate liability under the second contract (*Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (SCA) 1189). The same rule applies where the insolvent did not resell the property which he bought but ceded his right to receive transfer under the contract (*Britz v De Wet NO en 'n ander* 1965 (2) SA 131 (O); *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* (*supra*)).

7.2.3 Consequences of repudiating contract

If the trustee elects to repudiate the contract (or if he is deemed to have done so), the

Page 109

opposite party is prevented from obtaining an order of specific performance, even if he has performed his own obligations in full. But he may exercise the other remedies for breach of contract. In this respect, the trustee's act (or deemed act) of repudiation is subject to the same consequences as an unlawful repudiation by a solvent party (*Somchem (Pty) Ltd v Federated Insurance Co Ltd & another* 1983 (4) SA 609 (C) 615–16).

If the opposite party chooses to disregard the repudiation and keep the contract alive, he may, it seems, prove a concurrent claim for damages in lieu of performance. He then remains liable for, and must render, his own counter-

performance. If he chooses to cancel the contract, the following consequences ensue:

- He may recover any property handed over in performance of his obligations and still owned by him (cf *Smith & another v Parton NO* 1980 (3) SA 724 (D)).
- He is obliged to make restitution according to the normal principles of the law of contract (*De Wet NO v Uys NO en andere* 1998 (4) SA 694 (T) 705), unless the contract contains a forfeiture clause excusing him from doing so (*Tangney & others v Zive's Trustee* 1961 (1) SA 449 (W) 453).
- He has a concurrent claim in respect of property which he has transferred, and payments which he has made, to the debtor, and for loss which he has suffered because of the breach (*Smuts, Trustee of Neethling v Neethling* (1844) 3 Menz 283 286; *Harris v Trustee of Buissinne* (1840) 2 Menz 105; *Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) 90).

7.2.4 Consequences of abiding by contract

If the trustee elects to carry on and complete the contract, he 'steps into the shoes' of the insolvent. He may insist on receiving any performance owed by the other party, and he is bound to carry out any counter-prestation that the contract required of the insolvent (*Ward v Barrett NO & another NO* 1963 (2) SA 546 (A) 554; *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) 26). He cannot demand to be treated differently simply by reason of the sequestration (cf *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO* 2001 (1) SA 360 (SCA) 369). In *Bryant & Flanagan (Pty) Ltd v Muller & another NO* 1978 (2) SA 807 (A), M concluded a building contract with T Co. While building was in progress, T Co was placed in liquidation and B & F were

appointed as liquidators. At the time of the liquidation, T Co owed M an amount for work already performed. After liquidation, B & F called upon M to finish the work in terms of the contract. M did so. B & F then took the attitude that M had only a concurrent claim against the estate for work done before liquidation (except for certain repairs to a beam). But the court held that as B & F had chosen to continue with the executory contract, B & F were liable to pay M in full for the pre-liquidation work. Van Winsen AJA said (*idem* 815):

'No right in law resides in the [trustees] to abide by the contract and at the same time unilaterally make a stipulation derogating from [M's] rights under the contract.'

If the trustee, without tendering full performance, demands performance from the other party, the latter is entitled to raise the defence of *exceptio non adimpleti contractus* (the exception of the unfulfilled contract) (*Frank v Premier Hangers CC* 2008 (3) SA 594 (C); *Smith v Van den Heever & others* 2011 (3) SA 140 (SCA)).

Page 110

By electing to uphold the contract, the trustee becomes liable to perform only what is reciprocally due to the other party. The trustee need not, for example, pay an amount still owing for property transferred to the insolvent before sequestration if the obligation to transfer the property is not, in terms of the agreement, reciprocal to the duty to pay the balance of the price (*Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) 193).

The cost of performing in favour of the other party is an administration expense (*idem* 192), giving rise to a preferent claim by the other party (s 97(2); see 16.3.2(iii)). This cost must be paid for in full from the proceeds of the estate assets or, if these are insufficient, from contributions

levied against proved creditors (*Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd* 1969 (2) SA 127 (W) 142; on the duty to contribute, see 17.1.4). The trustee should obviously take this factor into account when deciding whether upholding the contract will benefit the general body of creditors (*Du Plessis & another v Rolfes Ltd* 1997 (2) SA 354 (A) 364).

In taking over the insolvent's rights under the contract, the trustee automatically takes over any defects in those rights. So the other party is entitled to raise against the trustee any defences he could have raised against the insolvent (*Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) 567–8; *Bryant & Flanagan (Pty) Ltd v Muller & another NNO* 1977 (1) SA 800 (N) 805). It follows that, if the opposite party, before the sequestration, acquired the right to cancel the contract on the grounds of a breach, he may exercise that right against the trustee, even if the latter wishes to continue with the contract and tenders the performance promised by the insolvent. So, in other words, here the trustee's power to continue with the contract is excluded. In *Smith & another v Parton NO* 1980 (3) SA 724 (D), S sold a restaurant business to P on instalments. P defaulted in his payments and, under the agreement, S gave him notice to cure his breach, failing which S would cancel the contract. This P did not do, so S caused his estate to be sequestrated. S then sought to exercise his right to cancel the contract and claim the return of the business, which he still owned. His claim succeeded, the court holding that his accrued right to cancel the contract had survived the insolvency. According to *Porteous v Strydom NO* 1984 (2) SA 489 (D), the opposite party may cancel for breach even where a notice which he gave the debtor to cure his default had not expired by the time of sequestration. Galgut AJ observed (*idem* 494):

'[Nothing] in our law excuses the trustee from performing the insolvent's obligations which fall due to be performed between the date of sequestration and the date on which the trustee makes his election. In other words should the trustee during this period fail to perform such obligations, and should the seller in consequence thereof cancel the contract . . . then the trustee cannot be heard to say . . . , should he elect to abide by the contract, that the seller's cancellation is then ineffective.'

It has been held that the issue is simply whether the right to cancel exists at the time of cancellation (*Ellerine Brothers (Pty) Ltd v McCarthy Ltd (supra)* 28–9). In this respect, the decisions in *Smith & another v Parton NO (supra)* and *Porteous v Strydom NO (supra)* were approved.

Bearing in mind the three factors mentioned in 7.2.1(i) above, the discussion now moves to investigate several types of contracts and the implications for the

Page 111

sequestration of the respective contracting parties' estates. The interplay between the common law and the relevant statutory provisions is noted where relevant.

7.3 Purchase and sale of immovable property

7.3.1 Sequestration of purchaser's estate

The trustee of the purchaser's insolvent estate has the usual election at common law whether to uphold or repudiate the sale (see 7.2.2). But statute adds provisions on how that election must be exercised. Section 35 of the Insolvency Act does not set a period within which the election must be exercised but leaves it to the other contracting party to take the initiative. Where the insolvent contracted to acquire immovable property and the property has not been transferred to him, the trustee must elect to uphold or repudiate the contract within six weeks after

receiving written notice from the other party (the seller) calling upon him to do so (s 35). If the trustee does not make his election and notify the other party accordingly, the latter may apply to court for the cancellation of the contract and the return of possession of the property. The other party may also prove a concurrent claim against the estate for loss suffered as a result of the non-fulfilment of the contract (*ibid*). On the other hand, if the trustee does elect within the required six weeks to uphold the contract, he must perform the insolvent's obligations (*Jooste's Estate v Ivy* 1947 (4) SA 480 (T)). The seller may sue for the purchase price and is obliged to pass transfer (*Uys & another v Sam Friedman Ltd* 1935 AD 165). The exception to this rule is if the other party establishes a breach of contract that justifies cancelling the contract.

'Trustee', for the purposes of s 35, includes a provisional trustee (ss 2 and 18(3)). If a provisional trustee is called upon to adopt or abandon a contract, he must ask for directions from the Master (s 18(2)). If the Master does not respond, the provisional trustee may use his own discretion (s 18(3) read with s 81(1)(h) and (3); *Botha v Von Reiche NO en 'n ander* 1962 (1) SA 863 (T)). The trustee takes directions from the creditors (s 81).

The courts have differed on whether s 35 applies to a 'composite' contract, ie, one for the acquisition of immovable property together with other property. In *Kuming v Paterson NO* 1954 (2) SA 130 (E), it was held that a contract of sale of a hotel consisting of land, buildings, furniture and goodwill fell within the terms of s 35, even though the parties had expressly provided that the sale of the property was 'indivisible'. De Villiers J took the view that the section applies if the contract is, among other things, one for the acquisition of immovable property, irrespective of whether movables are included in the *res vendita* (the thing sold) as well. By contrast, in *Tangney &*

others v Zive's Trustee 1961 (1) SA 449 (W), the court rejected the reasoning in *Kuming's* case and held that s 35 applies only to an 'ordinary' contract for the sale of immovable property, not a composite contract in respect of both immovable and movable assets. It seems clear that applying the *Tangney* principle could easily lead to absurd results. For instance, s 35 would not apply to the sale of a block of flats for R5 million if a few items of furniture formed part of the *res vendita*. For this reason, it is submitted, *Tangney's* case should not be followed. The correct inquiry would appear to be whether the contract is *substantially* one for the acquisition of immovable property.

Page 112

As the wording of s 35 refers to the uncompleted acquisition of immovable property, arguably it also applies to other contracts for such acquisition that are not sale contracts.

7.3.2 Sequestration of seller's estate

The sequestration of the seller's estate is dealt with under the common law or under s 22 of the Alienation of Land Act. It is therefore necessary to study the terms of the contract to determine whether the land has been sold mainly for residential purposes and on instalments: if so, then s 22 of the Alienation of Land Act may apply and protect the purchaser. But if the immovable property has not been sold on these restricted statutory terms, the purchaser's position is usually weak, unless he can rely on the restricted terms of an exception under *Sarrahwitz v Maritz NO & another* 2015 (4) SA 491 (CC) that protects him as a vulnerable purchaser on constitutional grounds.

(i) The combination of s 20(1)(a) of the Insolvency Act and the general rule on contracts at common law

The weakness of the purchaser's legal position is due to the rule that, under s 20(1)(a) of the Insolvency Act (see 5.2 above), the immovable property that the seller has sold but not yet transferred to the purchaser passes to the trustee of the seller's insolvent estate. In this respect, the law of Holland was adopted at the Cape of Good Hope (*Harris v Trustee of Buissinne* (1840) 2 Menz 105).

In addition, the trustee may choose whether to uphold or repudiate the sale, having regard to the best interests of the creditors (see 7.2.2). If he upholds the sale, he must perform all the seller's obligations under the sale (see 7.2.3). But if, as is more likely, the trustee elects not to perform, the purchaser—even if he has performed in full and thus paid the purchase price in full—may not demand the transfer of the property. Instead, he must content himself with a concurrent claim against the insolvent estate for the repayment of amounts already paid and for damages in respect of loss incurred as a result of the breach (*Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) 90; see 7.2.4). The best interests of the general body of creditors will seldom be conducive to the trustee's choosing to uphold the sale, because the immovable property will usually be one of the more valuable assets in the insolvent estate. And as regards these concurrent claims, the disappointing reality is that in many cases there are not enough funds left in the free residue to pay a dividend to concurrent creditors and so these concurrent claims are never paid.

The purchaser's weak position at common law may then only be improved if he can prove that he meets the exceptional terms of the decision in *Sarrahwitz v Maritz NO & another* (*supra*). This decision, based on the Constitution, protects a vulnerable purchaser of residential property (see 7.3.2(iii) below).

(ii) The sale of land on instalments under the Alienation of Land Act

Now the discussion turns to the sale of immovable property on the restricted terms covered by the Alienation of Land Act. The trustee's power to repudiate the contract (see 7.2.2) may be excluded where the insolvent has:

- sold land on instalments; or
- alienated (ie, sold, donated or exchanged) land which has later been sold on instalments; and
- the land has not been transferred under the transaction(s) in question. Chapter II and

Page 113

s 27 of the Alienation of Land Act 68 of 1981 give the buyer on instalments and other parties the right to compel the transfer of the land, provided they meet certain requirements.

The type of transaction governed by Chapter II (referred to in the Act as a 'contract') is a sale of land on instalments in which the purchase price is payable in two or more instalments over a period exceeding one year (s 1). 'Land' in the context of Chapter II (but not the rest of the Alienation of Land Act) means land used or intended to be used mainly for residential purposes and excludes agricultural land as defined in the Subdivision of Agricultural Land Act 70 of 1970 (*ibid*). Included in the definition of 'land' are a unit as defined in the Sectional Titles Act 95 of 1986, a right to claim transfer of land, and an undivided share in land (*ibid*). Chapter II does not apply where the State or a local authority is the seller (s 4).

To provide for the case in which land is disposed of under successive transactions without being transferred, Chapter II uses the concepts of an 'intermediary' and a 'remote purchaser'. A remote purchaser means a person who

purchases land in terms of a contract from another person who is not the owner of the land (s 1). And an intermediary is a person who sells land to a remote purchaser or a person who has alienated land which, after the alienation, is sold by another person to a remote purchaser and which, at the time of the sale, must still be transferred to the first-mentioned person (*ibid*). 'Alienate' for the purposes of the Act means sell, donate or exchange (*ibid*).

The main effect of Chapter II is the following:

- Where the insolvent has sold his land in terms of a contract, the purchaser may compel the trustee to pass transfer of the land in his favour, provided he arranges to pay all transfer costs plus whichever is the larger of
 - the total amount outstanding under the deed of alienation; or
 - the sum of the following costs:
 - the administration costs payable in terms of s 89(1) of the Insolvency Act;
 - any endowment, betterment or enhancement levy, development contribution or similar imposition, payable in relation to the land; and
 - the amount required to discharge any mortgage bond on the land, including interest to date of transfer (s 22(1)).
- The arrangements for payment must be made to the satisfaction of the owner's trustee within such period as the trustee may allow, but this period must not be less than 30 days (s 22(2)).
- Where the insolvent has alienated his land to an intermediary, the intermediary is in the same position as the buyer under a contract and can compel transfer in his favour (s 22(1)).

- Where the insolvent alienated his land and later it was alienated to an intermediary or to a remote purchaser, either the intermediary or the remote purchaser is entitled to transfer if
 - he fulfils or undertakes to fulfil the obligations in terms of his own deed of alienation; and
 - the obligations of every intermediary between the owner and himself are fulfilled (s 22(5) read with s 18(1)).
- If transfer is not claimed by any of the persons entitled to it, and the trustee abandons the agreement made by the insolvent and realizes the land for the benefit of

creditors, the purchaser of the land under a contract which has been recorded against the title deed of the land has a preferent claim—not merely a concurrent one—in respect of the proceeds of the realization (s 20(5)). Section 20(1) provides that any person who sells land under a contract (whether or not he is the owner of the land) must cause the contract to be recorded by the Registrar of Deeds, provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded. The purchaser's preferent claim ranks immediately after the claim of a mortgagee whose bond was registered before the recording of the contract and equals the amount that the purchaser may recover under s 28(1) in the event of the contract being terminated (s 20(5) (a)).

The Alienation of Land Act aims to ensure that every party who has the right to transfer is aware of his right and can exercise it. A remote purchaser is required immediately to notify the owner of the land of the conclusion of the

contract, his address as set out in the contract, and the name and address of any intermediary who alienated the land before the conclusion of the contract (s 21(1)). In the event of the owner's insolvency, the owner is obliged to pass on these details to the trustee within 14 days of the latter's appointment (s 21(2)(a)). Similarly, a mortgagee must, within ten days after he receives notice of the insolvency, inform the trustee of the name and address of any purchaser who gave notice to him that he had bought the land in terms of a contract (*ibid*). The trustee is under a duty, as soon as is practicable, to notify every person who he has reason to believe purchased the land in terms of a contract or is an intermediary of his right (that person's) to take transfer of the land (s 21(2)(b)).

(iii) Restricted protection of a vulnerable purchaser of residential property: the *Sarrahwitz* exception

In *Sarrahwitz v Maritz NO & another* 2015 (4) SA 491 (CC), the Constitutional Court considered the Alienation of Land Act in the light of the constitutional right to adequate housing (s 26 of the Constitution of the Republic of South Africa, 1996). The Alienation of Land Act protects those who purchase residential property on instalments, but not those who do so under a cash sale. The Act was held to be unconstitutional in not providing for the transfer of a residential property from an insolvent estate to avoid the homelessness of a vulnerable purchaser who has paid the full purchase price within one year of the contract (*Sarrahwitz v Maritz NO & another* (*supra*) 518–19).

Several steps followed by order of the Constitutional Court:

- The words 'including residential property paid for in full within one year of the contract, by a vulnerable purchaser' were to be read into the definition of 'contract' at the end of s 1(a) of the Alienation of Land Act.

- The definition of a 'vulnerable purchaser' was added to the definitions in s 1 of that Act. The expression 'vulnerable purchaser' means 'a purchaser who runs the risk of being rendered homeless by a seller's insolvency'.
- The words 'on instalments' were removed from the title of Chapter II of that Act.
- Under s 4(2) of that Act, ss 21(2) and 22 apply, with the necessary changes, to a deed of alienation in terms of which a vulnerable purchaser of a residential property paid the full purchase price within one year of the contract, before the seller's insolvency.
- The protection applies only where the seller's insolvent estate has not been finalized.

7.4 Instalment agreement regarding movable goods

7.4.1 Sequestration of buyer's estate

Special rules apply if the insolvent has bought movable goods in terms of an agreement falling within paras (a), (b) and (c)(i) of the definition of 'instalment agreement' in s 1 of the National Credit Act 34 of 2005. Section 84(1) of the Insolvency Act provides that on the sequestration of the buyer's estate, the seller automatically acquires a hypothec over the *res vendita*, whereby the balance outstanding under the agreement is secured. Since no one may have a hypothec over his own property, ownership in the *res vendita* passes from the seller to the insolvent estate (*Williams Hunt (Vereeniging) Ltd v Slomowitz & another* 1960 (1) SA 499 (T) 501; *Van der Burgh v Van Dyk en 'n ander* 1993 (3) SA 312 (O); *Standard Bank of South Africa Ltd v Townsend & others* 1997 (3) SA 41 (W) 50). The

effect of the sequestration of the buyer's estate, therefore, is that the seller loses his right of ownership in the property and simultaneously becomes a creditor with a hypothec over the property. The trustee of the buyer's estate must, if required by the seller, deliver the *res vendita* to him, and after that the seller is deemed to hold it as security for his claim, and has the rights of a secured creditor to realize his security as prescribed by the Insolvency Act (*ibid*; see also 15.2.4).

An instalment agreement envisaged by paras (a), (b) and (c)(i) of the definition of 'instalment agreement' in s 1 of the National Credit Act 34 of 2005 is one in terms of which

- all or part of the price is deferred and is to be paid by periodic payments;
- possession and use of the property is transferred to the consumer; and
- ownership of the property passes to the consumer only when the agreement is fully complied with.

A transaction which meets these requirements is governed by s 84(1) of the Insolvency Act, even if it falls outside the ambit of the National Credit Act 34 of 2005 (cf *Potgieter NO v Daewoo Heavy Industries (Edms) Bpk* 2003 (3) SA 98 (SCA) 100–2). It is unclear whether an instalment agreement for these purposes includes a sale of goods in which the price is payable in *one lump sum* at a future time (cf *Sandoz Products (Pty) Ltd v Van Zyl* NO 1996 (3) SA 726 (C) and *Ukubona 2000 Electrical CC & another v City Power Johannesburg (Pty) Ltd* 2004 (6) SA 323 (SCA) 327). 'Movables', in this context, means *corporeal* movables: the sale of a business falls outside the definition (*A-Team Drankwinkel BK en 'n ander v Botha en 'n ander* NNO 1994 (1) SA 1 (A) 17).

Section 84(1) of the Insolvency Act presupposes an agreement still in force. The section does not apply if the seller has, before the sequestration, cancelled the

agreement on account of the buyer's default and the buyer has not obtained reinstatement in terms of the National Credit Act (*Absa Bank Ltd v Cooper NO & others* 2001 (4) SA 876 (T); *PMG Motors Kyalami (Pty) Ltd & another v FirstRand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA) 646). Section 84(1) of the Insolvency Act also presupposes that the seller owns the *res vendita*—no hypothec arises in favour of a seller who is not the owner (*Ukubona 2000 Electrical CC & another v City Power Johannesburg (Pty) Ltd (supra)* 328). There was formerly some uncertainty over whether the section applies if the trustee is not in possession of the property: for example, because the insolvent sold and delivered the property to another person before sequestration. In *UDC Bank Ltd v Seacat Leasing and Finance*

Co (Pty) Ltd & another 1979 (4) SA 682 (T), it was held that the section does not apply in such a case, so that the seller does not lose his ownership of the thing sold. But in *Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of 'The Village' & others* 1981 (3) SA 97 (D), the court reached the opposite conclusion. It held that when the trustee receives a demand for delivery, he is obliged to obtain possession of the property from the third party and deliver the property to the seller. In the court's view, the only possible exceptions are cases of physical impossibility and the possessor's ability to assert a right which defeats the trustee's right. This view was confirmed (and the controversy settled) by the Appellate Division in *Venter NO v Avfin (Pty) Ltd* 1996 (1) SA 826 (A). Scott AJA said (*idem* 835):

'In *Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village" & Others* 1981 (3) SA 97 (D) Hefer J declined to adopt [the] interpretation of s 84(1) [adopted in *UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd & another* 1979 (4) SA 682 (T) 694]. At 101G-H the

learned Judge explained: "A trustee who does not have possession of the assets of the estate has not exercised the right nor indeed carried out the duty which he has in terms of s 69(1) of the Act to reduce all the movable property belonging to the estate into his possession or under his control. He may exercise that right against anyone in respect of any movable property belonging to the estate, and he may do so specifically for the purpose of being able to comply with a demand for delivery of hire-purchase goods in terms of s 84(1). There is thus no question of not being able to comply with such a demand: if the trustee does not have possession, he can and must obtain it."

I respectfully agree with the above statement. It is true that s 84(1) assumes the trustee to be in possession. But, as pointed out by Hefer J at 102E . . . "in an insolvency which proceeds normally, the trustee will obviously carry out the elementary task of taking possession or control of the assets; that he will do so is assumed and that is why, for purposes of s 84(1), it is assumed that he is in possession of the hire-purchase goods".

With regard to the situation that may arise where the trustee is not in possession of the property, the learned Judge at 102F-G posed and answered the obvious question: "Can he (the trustee), eg, when faced with a demand for delivery in terms of that section (s 84(1)), in the light of his duty to reduce the assets of the estate into his possession or control, ever be heard to say simply that he does not possess the property which the creditor wants him to deliver? Obviously not, because he will be obliged to carry out his duty, to obtain possession and to deliver the property to the creditor."

In my view the reasoning of the learned Judge cannot be faulted. I accordingly adopt the decision in the *Hubert Davies* case in preference to that in the *UDC Bank* case (see also *Morgan & 'n Ander v Wessels NO* 1990 (3) SA 57 (O) at 65D-G . . .).'

Under s 84(2) of the Insolvency Act, if the debtor (buyer) returns the property to the creditor (seller) within one month before sequestration, the trustee may demand that the seller deliver to him the property or its value at the date of return, subject to payment to the creditor by the trustee or to deduction by the creditor from the value of the property (as the case may be) of the difference between the total amount payable under the transaction and the total amount actually paid under it. Here the legislature clearly intended to enable the trustee to reclaim the property for the benefit of concurrent creditors, in cases where the outstanding amount is disproportionately small in comparison to the value of the article returned. The

trustee's payment is a cost of administration (s 97). Once it is made, the seller loses ownership of the *res vendita* (Pretorius and Van der Vyver (1973) 36 *THRHR* 396 410–11).

Section 84(2) of the Insolvency Act does not apply if the contract has been

cancelled before sequestration (*PMG Motors Kyalami (Pty) Ltd & another v FirstRand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA) 646–7). Payments by a creditor in lieu of restoring the hypothecated goods to the trustee would be recoverable through an enrichment claim.

7.4.2 Sequestration of seller's estate

The type of contract envisaged here is one in which goods are sold on instalments and the seller reserves ownership in the goods until the buyer has fully performed his side of the contract (in other words, paid the full price and met his other obligations). The Insolvency Act does not make special provision for this kind of contract.

Some academic writers argue that where the seller is declared insolvent before the price has been fully paid and ownership has passed to the buyer, the trustee may not repudiate the contract and vindicate the goods if the buyer continues to pay instalments and fulfil his other obligations in terms of the contract. There is no clear case authority to this effect, and it is difficult to see on what basis an exception can be made to the ordinary principles governing uncompleted contracts and the general rule of treating creditors' claims proportionately, unless there is a real right of security or a recognized statutory preference applicable.

It is submitted that the trustee steps into the shoes of the insolvent seller and has an election to uphold or to

repudiate the contract, as he does in relation to uncompleted contracts generally (see 7.2.2). If he chooses to repudiate the sale, he may recover the goods (since they are still owned by the seller's estate), and the buyer merely has a concurrent claim for damages (see 7.2.3).

7.5 Sale of movable property under a contract that is not an instalment sale

7.5.1 Credit sale of movable property

Under a credit sale of movables, the parties agree that the price will be paid on a date after the date of delivery. Ownership of property sold on credit passes to the buyer on delivery of the property to the buyer, unless it is a term of the agreement that ownership will pass only at some later stage. If the seller's estate is sequestrated before the purchase price is paid, the trustee may claim payment of the purchase price and also the performance of the buyer's other obligations. If the buyer's estate is sequestrated before the purchase price is paid, ownership has already passed to the insolvent buyer (and so the property vests in the trustee (s 20(1)(a) of the Insolvency Act)), and the seller has a concurrent claim for the performance of the buyer's outstanding obligations.

7.5.2 Cash sale of movable property

Ownership of property sold for cash passes to the buyer only once the property has been delivered and the purchase price has been paid in full. The Insolvency Act limits the right of the other party to exercise an accrued right of cancellation where the contract is a cash sale of movable property. Under such a sale, the parties agree that the price will be paid on delivery of the *res vendita*. By virtue of s 36(1) and (4), a seller of movable property for cash, who

has delivered the property but not been paid (and who, therefore, has the right, in terms of general contractual principles, to cancel the contract and

recover the property) cannot reclaim the property from the trustee of the buyer's insolvent estate unless

- he (the seller) has given notice in writing to the buyer (or the trustee or the Master) within ten days after *delivery* (not sequestration) that he reclaims the property; and
- if the trustee disputes his right to reclaim the property, he institutes legal proceedings within 14 days of receiving notice of the trustee's objection.

So the seller must act quickly. Conceivably, the sequestration of the buyer's estate may only take place long after the ten days that follow the delivery date. The seller must give notice within those ten days and then institute legal proceedings within 14 days if the trustee refuses to return the property sold.

If the seller does not give the required statutory notice, he loses his right to reclaim his property on the basis that the buyer did not pay the purchase price (s 36(4); *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) 180). He then has a concurrent claim against the insolvent estate for the unpaid purchase price.

The trustee of the buyer's insolvent estate may refuse to return the property to the seller unless refunded all the purchase price that the seller has received (s 36(3)).

It should also be noted that s 36 of the Insolvency Act does not apply to an instalment agreement governed by the National Credit Act 34 of 2005 (see 7.4.1).

7.6 Lease

7.6.1 Sequestration of lessor's estate

The position of the lessor who leases the property to the lessee is not dealt with by statute, and so the common law applies. The sequestration of the lessor's estate does not automatically terminate the lease (*Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd* 1987 (1) SA 827 (A) 837; *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) 26–7). So the trustee has his usual election whether to uphold or repudiate the lease. His practical problem, though, is that he needs to realize the estate assets to pay creditors according to the order of preference (see chapters 15 and 16). For that reason, he will usually have to terminate the lease of a movable such as a car.

The procedure for dealing with immovable property works differently because of a rule of Roman-Dutch law protecting the sitting tenant (the lessee): 'huur gaat voor koop' (hire goes before sale). This rule does not apply to leases of movable property (such as mining rights or a car), but only to leases of land and buildings (*Graham v Local and Overseas Investment (Pty) Ltd* 1942 AD 95 110–11; *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 932). Because of the rule, the trustee cannot usually repudiate a lease of immovable property concluded by the insolvent as lessor and must realize the property subject to the lease (*Shell Rhodesia (Pty) Ltd v Eliasov NO* 1979 (3) SA 915 (R) 917). This rule still applies if the lease of the property was entered into before a real right (such as a mortgage bond) was registered over the property. The lease continues, and the lessee prevails over the holder of the real right because of the principle *qui prior est tempore potior est iure* (he who is first in time is preferred in right) (*Absa Bank Ltd v Sweet & others* 1993

(1) SA 318 (C) 324; *Shell Rhodesia (Pty) Ltd v Eliasov NO* (*supra*)).

Conversely, the trustee may be compelled to repudiate the lease if the real right (eg, a mortgage bond) was registered before the lease. The trustee is required initially to put the property up for sale subject to the lease. If the highest bid is insufficient to cover the amount due to the holder of the real right, the trustee must, at the request of the holder of the real right, sell the property free of the lease (*Timm v Kay & another* 1954 (4) SA 585 (T); *Oosthuizen & another v Mari & others* [2015] JOL 32431 (GJ); for the steps to be followed, see 15.2.5). The lease terminates, and the lessee has a concurrent claim for damages in respect of loss suffered because of the breach of contract (*Shell Rhodesia (Pty) Ltd v Eliasov NO* (*supra*)).

What happens if the procedure described above is not followed and the property that is subject to the real right (eg, a mortgage bond) is offered for sale free of the lease? This happened in *Velcich & others v Land and Agricultural Bank of South Africa & others* 1996 (1) SA 17 (A). When the property in that case was advertised and sold free of the lease, it fetched a sale price much lower than the amount owed under the mortgage bond. The court accepted the assumption that even if the accepted procedure described in the paragraph above had been followed, the result would have been the same: the highest bid would still have been lower than the bondholder's claim. The sale was thus held to be valid, and the property was sold free of the lease. The court's ready acceptance of the assumption was criticized (Kritzinger (1996) 113(2) *SALJ* 209). The sensible view is that the trustee bears the onus of proving that a sale subject to the lease would not have brought in a sum sufficient to satisfy the prior mortgage (*Shell Rhodesia (Pvt)*

Ltd v Eliasov NO (supra) 921 (*obiter*); to be contrasted with *Oosthuizen v Human* 1911 EDL 273 280, holding that the lessee bears the onus (see Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 583–4)).

7.6.2 Sequestration of lessee's estate

Where the lessee hires the property from the lessor, the effect of the sequestration of the lessee's estate on the lease is controlled by s 37, which is substantially similar to the common law (*Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) 28). The trustee may choose whether to continue the lease or repudiate it. Section 37 lays down rules on how the lease may be repudiated. If the insolvent hired property, the trustee may only repudiate ('determine') the lease by giving notice in writing to the lessor (s 37(1)). If the trustee does not, within three months of his appointment, notify the lessor that he desires to continue the lease on behalf of the lessee's estate, he is deemed to have repudiated it (s 37(2)). This three-month period enables the trustee to seek authority from the creditors at their second meeting or else from the Master (ss 81(1)(h), 81(1)*bis*, 81(3)).

Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd 1969 (2) SA 127 (W) concerned a charterparty in relation to a ship. The court held that s 37 of the Insolvency Act applies to movable or immovable property. But the Supreme Court of Appeal has ruled as incorrect the conclusion in *Montelindo* (*idem* 137–8) that a time charterparty or a voyage charterparty of a vessel is a lease (*MV Silver Star: Owners of the MV Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA) 345n26). A demise charterparty is a lease (*MV Madiba 1: Van Niekerk v MV Madiba 1* [2022] JOL 54278 (WCC) para 25) and is therefore subject to s 37. It is submitted that *Montelindo* is still good law for contracts that are, indeed, leases: see the examples in *Montelindo* (*supra*)

132 133. A partiarian lease (a crop-sharing agreement) is also governed by s 37 (*Noord-Westelike*

Koöperatiewe Landboumaatskappy Bpk v Die Meester en andere 1982 (4) SA 486 (NC)). But a labour tenancy is not a lease, and so is governed not by s 37 but by the ordinary principles of the common law (*Zulu & others v Van Rensburg & others* [2011] JOL 24875 (LCC) 22–5; for the ordinary principles of the common law, see 7.2 above).

The trustee's usual election to continue the lease is excluded by the lessor's right to cancel the lease on the grounds that the lessee breached the lease before the sequestration occurred (eg, by not paying the rent (*Mitchell v Sotiralis's Trustee* 1936 TPD 252)). The lessor may also cancel a lease whose terms entitle him to do so if the estate of a surety of the tenant is sequestrated or placed in liquidation (*Zitonix (Pty) Limited v K201250042 (South Africa) (Pty) Limited* 2018 JDR 0688 (SCA) paras 7 12–15).

Repudiation of the lease according to s 37 deprives the insolvent estate of any right to compensation for improvements, other than improvements made under an agreement with the lessor (s 37(4)). The lessor has

- a preferent claim for rent payable from the date of sequestration to the date of determination of the lease (this claim is included in the costs of the administration of the estate: s 37(3));
- if the property is immovable, a secured claim by reason of his tacit hypothec, for rent owed at the time of sequestration (this claim is limited by the Act: see 16.2.2); and
- a concurrent claim in respect of any other loss sustained because of the non-performance of the lease (s 37(1); *Norex Industrial Properties (Pty) Ltd v*

Monarch South Africa Insurance Co Ltd 1987 (1) SA 827 (A); Ellerine Brothers (Pty) Ltd v McCarthy Ltd (supra) 27).

Affording a preference to part of the lessor's claim for rent does not transform the obligation to pay the rent into a new obligation or change its essential juristic nature. A third person who has stood surety for the rent cannot therefore competently argue that the sequestration absolves him from liability because it discharges the principal obligation (*Boshoff v South African Mutual Life Assurance Society* 2000 (3) SA 597 (C)).

7.7 Employment contract

7.7.1 Sequestration of employee's estate

Usually, the sequestration of the employee's estate does not affect the contract of employment, which therefore continues. The exception to this general rule is that a statutory provision may disqualify the insolvent from holding a position or office while he has not yet been rehabilitated (see 4.4).

7.7.2 Sequestration of employer's estate

The sequestration of an employer's estate suspends the employment contract between him and his employee with immediate effect (s 38(1)). During the period of the suspension

- the employee is not obliged to render services, and is not entitled to his salary or wage (s 38(2)(a)) (but he may recover compensation for any loss he suffers as a result of the suspension (s 38(10)(a)));

- no employment benefit accrues to the employee (s 38(2)(b)), although he may receive unemployment benefits from the date of the suspension (s 38(4)).

The trustee may terminate the contract (s 38(4)), provided that he has engaged in consultation aimed at reaching consensus on appropriate measures to rescue the whole or part of the insolvent employer's business (s 38(5)–(7)). The trustee is required to consult whomever the employer would have been obliged to consult in terms of a collective agreement or, if there is no agreement requiring consultation, the workplace forum and registered trade union representing the employee, or in the absence of a workplace forum, the employee's registered trade union, or if there is no such trade union, the employee personally or his nominated representative (s 38(5)). If any of these parties wishes to make proposals about what measures should be taken, that party must submit his proposals in writing to the trustee within 21 days of his appointment, unless the trustee and an employee agree otherwise (s 38(7)). A creditor of the insolvent employer may, with the trustee's consent, take part in the consultation (s 38(8)). The 'appropriate measures' considered must include the sale of the whole or any part of the business (s 38(6)). The transfer of the business (or part of it) has the effect that the employment contract continues with the new owner, the latter being substituted in the place of the old employer (ie, the insolvent) (see s 197A(2) of the Labour Relations Act 66 of 1995). However, the rights and obligations which existed under the contract between the old employer and the employee at the time of transfer remain in force between these parties, and anything done before the transfer by the old employer in relation to the employee (eg, dismissal of the employee, or the commission of an unfair labour practice, or an act of

discrimination) is considered to have been done by the old employer (see s 197A(2) of the Labour Relations Act).

If no measure is adopted which results in a continuation of the contract and the trustee does not bring the contract to an end, the contract automatically terminates 45 days after the date of appointment of the trustee (s 38(9)(a) of the Insolvency Act).

On the termination of the contract (ie, by the trustee or by effluxion of time), the employee is entitled to recover any resultant loss he has suffered as well as severance benefits in accordance with s 41 of the Basic Conditions of Employment Act 75 of 1997 (s 38(10)–(11) of the Insolvency Act). The employee's claim for the latter is a preferent one (see 16.3.2(vi)).

7.8 Transactions on market infrastructure

Section 35A of the Insolvency Act lays down special rules for a transaction to which the rules of a 'market infrastructure' apply and in which the insolvent was a 'market participant'. The words 'market infrastructure' replaced the word 'exchange' in s 35A with effect from 29 March 2018 (see Schedule 4, Item 2 of the Financial Sector Regulation Act 9 of 2017; GN 169 *Government Gazette* 41549 of 29 March 2018) and in the heading of s 35A with effect from 29 April 2022 (s 2 of the Financial Sector Laws Amendment Act 23 of 2021; GN 2050 *Government Gazette* 46288 of 29 April 2022).

A 'market infrastructure' means

- (a) an exchange as defined in s 1 and licensed under s 9 of the Financial Markets Act 19 of 2012; and
- (b) a central securities depository as defined in s 1 and licensed under s 29 of that Act; or

- (c) a clearing house as defined in s 1 of that Act and licensed under s 49 of that Act;
- (d) a central counterparty as defined in s 1 of that Act and licensed under s 49 of that Act; or
- (e) a licensed external central counterparty as defined in s 1 of that Act.

A 'market participant' means an authorized user, a participant, a clearing member or a client as defined in s 1 of the Financial Markets Act, or any other party to a transaction (s 35A(1) of the Insolvency Act). The 'rules' mean the exchange rules, depository rules or clearing house rules, as defined in s 1 of the Financial Markets Act (s 35A(1) of the Insolvency Act). And a 'transaction' means any transaction to which the rules apply (*ibid*).

The following rules apply:

- On the sequestration of the market participant's estate, if that participant's obligations entered into before sequestration have not been fulfilled, the market infrastructure or any other market participant may, in respect of the obligations owed to it, terminate the transaction in accordance with the rules or revoke settlement instructions, and the trustee is bound by such termination or revocation (s 35A(2)).
- Any resultant claim is limited to the amount due upon termination or revocation under the rules (s 35A(3)).
- The trustee is bound by the rules and practices of the exchange providing for
 - the netting of a market participant's position; or
 - for set-off in respect of transactions concluded by a market participant; or
 - for the opening and closing of a market participant's position

if, in terms of such rules and practices, the transaction is to be settled on a date after the sequestration, or settlement of the transaction is overdue on the date of sequestration (s 35A(4)).

7.9 Agreements providing for termination and netting

Section 35B provides for the case in which the insolvent was a party to a 'master agreement'. A 'master agreement' includes, among other things, an agreement in accordance with the standard terms published by the International Swaps and Derivatives Association, the International Securities Lenders Association, the Bond Market Association or the International Securities Market Association (s 35B(2); for the full definition, see the Insolvency Act in Appendix 2). All unperformed obligations arising out of the agreement terminate automatically on the sequestration of the estate of a party to the agreement (s 35B(1)). The market values of the obligations as at the date of sequestration must be calculated, the values must be netted, and the net amount is then payable (*ibid*). Section 35B does not apply to a transaction contemplated in s 35A of the Insolvency Act (see 7.8) or to a netting arrangement contemplated in the National Payment System Act 78 of 1998 (s 35B(3) of the Insolvency Act).

7.10 Provisions designed to protect solvent party

The contract may contain one or more provisions designed to protect (or further) one party's interests in the event of the insolvency of the other party. This type of provision is void against the trustee of the insolvent party's estate if the provision purports to modify the legal consequences of the

concursum creditorum. The test in each case is whether the provision seeks to confer a power or a preference, or achieve a distribution

of assets for which the law of insolvency does not provide (cf *Thorne & another NNO v The Government* 1973 (4) SA 42 (T) 46).

7.10.1 Clause reserving ownership in goods until full payment made

The Supreme Court of Appeal has accepted that a clause reserving ownership in movable goods until the owner has been paid what is due to him is effective to prevent the goods from vesting in the debtor's insolvent estate (*Pellow NO & another v Club Refrigeration CC* 2006 (1) SA 230 (SCA)).

7.10.2 Clause providing for cancellation on insolvency

A clause appearing in many contracts says that one party may cancel the contract upon, among other things, the sequestration of the other party's estate. To the extent that a cancellation clause allows the termination of the contract on the basis of insolvency alone, it would seem to be unenforceable, because it purports to deprive the trustee of his election to complete the contract should he consider it to be in the best interests of creditors. This view is reinforced by s 37(5) stating that a stipulation in a lease that the lease will terminate or be varied upon the sequestration of the estate of either party is null and void (cf *Slims (Pty) Ltd & another v Morris NO* 1988 (1) SA 715 (A)).

By contrast, though, the Supreme Court of Appeal upheld a term of a lease entitling the lessor to cancel the lease if

the estate of a surety of the tenant was sequestrated or placed in liquidation (*Zitonix (Pty) Limited v K201250042 (South Africa) (Pty) Limited* 2018 JDR 0688 (SCA) paras 7 12–15); see 7.6.2. The court upheld the decision of the court *a quo* in this regard (*K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd* [2017] 2 All SA 232 (WCC) 242–4).

7.10.3 Clause providing for vesting or continued use of insolvent's property

In building and engineering contracts, the parties often agree that, in the event of certain contingencies, including the sequestration of the contractor's estate, the employer will automatically acquire ownership of the contractor's plant, materials and other assets then on site. In so far as this type of clause provides for vesting on the ground of the contractor's insolvency, it would appear to be invalid, since it offends against the rule that, on the granting of an insolvency order, all the property of the insolvent vests in the Master and later the trustee. Open to the same objection is a clause which says that, on the insolvency of the contractor, all his subcontracts will automatically be assigned to the employer.

A clause intended to achieve a similar practical result is one which says that the employer may, if the contractor should be declared insolvent, continue to use the contractor's property on site at the time of sequestration. This type of clause would seem to be invalid because it disregards one of the trustee's essential duties: to take charge of all the contractor's assets and sell them as directed by creditors (cf *Kahan NO v Hydro Holdings (Pty) Ltd* 1980 (3) SA 511 (T) 514; *Roux en andere v Van Rensburg NO* 1996 (4) SA 271 (A); *Commissioner, South African Revenue Service v Van der Merwe NO & others* 2017 (3) SA 34 (SCA) 42–3).

7.10.4 Clause providing for direct payment to subcontractors of insolvent

Many building and engineering contracts provide that if the contractor neglects to pay his subcontractors, the employer may do so and deduct what he has paid from what he owes the contractor. This provision, although generally unobjectionable, is invalid as against the trustee of an insolvent contractor, because it gives the subcontractors a preference over the other creditors in the *concurso creditorum*: payment otherwise than in accordance with the order of preference applicable on insolvency. In *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in Liquidation)* 1968 (4) SA 44 (D); 1969 (1) SA 660 (A), a building contractor had been placed in liquidation, and its employer, applying a 'direct payment' clause in the contract, had made payments to two nominated subcontractors and deducted the payments from the amount it owed the contractor. The court held that the employer had not been entitled to make this deduction. Ogilvie Thompson JA said (*Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in Liquidation)* 1969 (1) SA 660 (A) 671–2):

'Once the liquidation supervened, the two nominated sub-contractors were only entitled to receive from their debtor ([the] plaintiff company [the contractor]) whatever dividend was ultimately awarded to its concurrent creditors. By paying them in full after liquidation had already supervened, [the] defendant [employer] thus enabled the nominated sub-contractors to receive more than they were legally entitled to claim. . . . [A]lthough [the] defendant's payment to the nominated sub-contractors was made pursuant to the election conferred upon him, without apparent qualification, by . . . the contract, the exercise of that election after liquidation had supervened disturbed both the realization and the distribution of the plaintiff company's assets as prescribed by the law relating to liquidations.'

7.10.5 Clause providing for set-off on insolvency

The parties may agree that if one of them fails to perform his side of the contract, the other party may set off his resultant claim for damages against any debt which he owes to the party in default. This type of clause cannot be invoked where the defaulter has been declared insolvent, because it allows the other party (through the process of set-off) to obtain payment before other concurrent creditors and so transforms his concurrent claim for damages into a preferent claim. In *Thorne & another NNO v The Government* 1973 (4) SA 42 (T), a construction company contracted with the government to carry out three separate building projects (contracts A, B and C). While busy with these projects, the company was placed in liquidation. The liquidators resolved to complete contracts A and B and to abandon contract C. After completing contract A, the liquidators claimed payment. The government argued that it was entitled to set off against this claim its claim for damages arising from the liquidator's repudiation of contract C. The government relied on a clause in contract C to the effect that if the company failed to complete, the government would be entitled to employ another contractor and to deduct the cost of doing so 'from any sums due or to become due under this or any other contract . . . between the [parties]'. The court held that the set-off clause was unenforceable as against the liquidators. Margo J said (*idem* 45–6):

'[O]nce a *concurso creditorum* has been established, there can be no [set-off] unless mutuality between the respective claims existed at the date of the order In the present case there was no such mutuality between the respective claims prior to the winding up order It cannot make any difference to the legal consequences of a *concurso*

creditorum that the parties . . . concluded a pre-liquidation agreement authorising set-off. . . . [C]ontractual stipulations between the debtor and a creditor will not entitle the creditor to obtain a preference over other

creditors in the *concursum* otherwise than in accordance with the order of preference laid down by law.'

The decision in *Thorne & another NNO v The Government* (*supra*) was confirmed on appeal (*The Government v Thorne & another NNO* 1974 (2) SA 1 (A)) and applied in *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 (2) SA 807 (A) 815 and *Siltek Holdings (Pty) Ltd (in Liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2009] 1 All SA 571 (SCA) 573–4.

7.11 Legal proceedings commenced before insolvency

Criminal proceedings are in no way affected by sequestration. But civil proceedings against or by the insolvent—except for those proceedings which may, under s 23, be instituted against or by the insolvent in his own name (see 4.31)—are automatically stayed until a trustee is appointed (s 20(1)(b)).

A party who wishes to continue stayed proceedings against the estate must

- within three weeks after the first meeting of creditors, give notice of his intention to the trustee (or the Master if no trustee has been appointed); and
- after the expiry of a period of three weeks from the date of the notice, prosecute the proceedings with reasonable speed (s 75(1)).

If this party does not give the required notice, the proceedings automatically lapse (*ibid*). But the court may allow them to continue (on such conditions as it sees fit to impose) if it finds that there was a reasonable excuse for the failure to give notice (*ibid*). Before stayed proceedings can continue, an application must be made for substituting

the trustee on the record in the place of the insolvent, so that the proper person is before the court at the hearing.

The execution of any judgment against the insolvent is stayed from the moment that the sheriff whose duty it is to execute the judgment becomes aware of the sequestration order, except where the court directs otherwise (s 20(1)(c)). The fact that the relevant property has already been sold does not change the position (provided transfer has not taken place) (*Syfrets Bank Ltd & others v Sheriff of the Supreme Court, Durban Central, & another; Schoerie NO v Syfrets Bank Ltd & others* 1997 (1) SA 764 (D) 775–6; *Naidoo & another v Matlala NO & others* 2012 (1) SA 143 (GNP) 154).

If the insolvent is in prison for debt, he may, after notifying the creditor at whose instance he is being imprisoned, apply to the court for his release (s 20(1)(d)). It seems that this provision has become largely redundant since civil imprisonment for debt has been abolished and the Constitutional Court has ruled that those sections of the Magistrates' Courts Act 32 of 1944 which allow for the imprisonment of a debtor for failure to satisfy a judgment debt are constitutionally invalid (*Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer, Port Elizabeth Prison, & others* 1995 (4) SA 631 (CC)).

Part 4

Collection of estate assets

Chapter 8: Preservation of the estate pending the trustee's appointment

- 8.1 Notice of sequestration and entry of *caveats*
- 8.2 Service of order and attachment of property
- 8.3 *Curator bonis*
- 8.4 Provisional trustee

Chapter 9: Meetings of creditors and proof of claims

- 9.1 Meetings of creditors
- 9.2 Proof of claims
- 9.3 Voting and resolutions of creditors

Chapter 10: The election of the trustee

- 10.1 Election and appointment
- 10.2 Persons disqualified from being trustee
- 10.3 Vacation of, or removal from, office
- 10.4 Resignation and leave of absence
- 10.5 Election of new trustee
- 10.6 Recognition of foreign trustee
- 10.7 Remuneration

Chapter 11: The duties and powers of the trustee

- 11.1 Taking charge of assets and documents
- 11.2 Recovery of debts due to estate
- 11.3 Continuation of insolvent's business

- 11.4 Investigation of insolvent's affairs
- 11.5 Receipt book
- 11.6 Estate bank account
- 11.7 Report to creditors
- 11.8 Legal advice and proceedings
- 11.9 Submission of disputes to arbitration

Chapter 12:

Impeachable dispositions

- 12.1 Meaning of 'disposition'
- 12.2 Dispositions which may be set aside
- 12.3 Proceedings to set aside voidable disposition
- 12.4 Order setting aside disposition
- 12.5 Exemption of certain dispositions from Act
- 12.6 Transfer of business without prescribed notice
- 12.7 Transfer of business after proceedings instituted
- 12.8 Suggestions for visual learners using diagrams and timelines

Page 128

Chapter 13:

Interrogation of the insolvent and other witnesses

- 13.1 Interrogation by trustee (or creditor or presiding officer)
- 13.2 Interrogation by Master

Chapter 14:

The duties of the insolvent

- 14.1 Delivery of records and statement of affairs
- 14.2 Delivery of assets
- 14.3 Providing assistance
- 14.4 Providing information
- 14.5 Informing trustee of addresses
- 14.6 Record of assets and disbursements
- 14.7 Attending meetings and giving evidence

Chapter 8

Preservation of the estate pending the trustee's appointment

Synopsis

- 8.1 Notice of sequestration and entry of *caveats*
- 8.2 Service of order and attachment of property
- 8.3 *Curator bonis*
- 8.4 Provisional trustee
 - 8.4.1 Appointment
 - 8.4.2 Rights and duties
 - 8.4.3 Remuneration

Until the trustee has been appointed and can take charge of the estate assets, the assets must be preserved for the benefit of creditors. This chapter explains how this preservation is achieved.

8.1 Notice of sequestration and entry of *caveats*

Immediately after a sequestration order is granted, the Registrar must transmit one original of the order to the Master (s 17(1)(a)). The Master, in turn, must give notice of the order in the *Gazette* (s 17(4)). The Registrar must also send one original of every provisional sequestration order or final sequestration order not preceded by a provisional order to these parties:

- the sheriff of every district in which the insolvent resides or owns property;
- every Registrar of Deeds;
- every officer having charge of an official register of ships; and
- every sheriff holding any of the debtor's property under attachment (s 17(1)(b)).

The officers concerned must register the order (s 17(2)) and, where appropriate, must enter *caveats* against any transfer of ownership by the insolvent or his spouse and against the cancellation or cession of any mortgage registered in the name of the insolvent or his spouse and a *caveat* (a warning notice) against the transfer of every ship or share in a ship or the cancellation or cessation of every mortgage of it registered in the name of the insolvent or his spouse (s 17(3)(a) and (3)bis). A *caveat* regarding immovable property expires ten years after the date of the relevant sequestration order (s 17(3)(b)).

The statutory duties described above are imposed to inform interested parties that the estate has been sequestrated and to prevent any improper dealings with the

insolvent's property. The next step is to determine the extent of the assets and bring the whole estate under proper control.

8.2 Service of order and attachment of property

The Registrar of the court granting a final order of sequestration must, without delay, cause a copy of the order to be served on the insolvent and on the spouse of the insolvent (if the latter has a separate estate which has

not been sequestrated) and file with the Master a copy of the sheriff's return of service (s 16(1)). On being served with the order, the insolvent must immediately hand over to the sheriff all records relating to his affairs and lodge with the Master a statement of his affairs (s 16(2); see 14.1). The solvent spouse served with the sequestration order must also lodge a statement of her affairs with the Master (s 16(3); see 6.1.2).

Besides serving the order, the sheriff must attach and inventory the movable property of the estate that is in the district, capable of manual delivery and not in the possession of a person who claims to be entitled to retain it under a right of pledge, or a right of retention, or under attachment by a sheriff of a magistrate's court (s 19(1)). The sheriff must act with reasonable care in carrying out this duty (*Judelowitz's Trustee v The Sheriff* 1904 TS 839 842). Anyone who has an interest in the insolvent estate or the property attached may be present (s 19(2)), but he may not give directions to the sheriff about what property to attach or include in the inventory. In making the attachment and inventory, the sheriff discharges a statutory duty. He is legally accountable to the Master only. He owes no duty to the sequestrating creditor or any other interested party (*Administratrise van die Adriaan Odendaal Kindertrust v Adjunk-Balju, Harrismith en andere* 1991 (1) SA 465 (O) 471). Section 19(1) relates only to movable property capable of manual delivery and does not empower the sheriff to attach incorporeal rights (*Turquoise River Incorporated v McMenamin & others* 1992 (3) SA 653 (D) 658–9). In *Turquoise River*, it was held that the power to attach and seize assets is drastic, and so s 19(1) should be strictly construed.

The Act does not say how the trustee should assume control of the solvent spouse's separate property, which vests in the Master and the trustee under s 21 (see 6.1).

Yet it has been held that the trustee must also have this property attached. Until he does so, he is not entitled to deal with the property in terms of the Act and so cannot remove it from a third party's possession (*Cothill et Uxor v Cornelius* 2000 (4) SA 163 (T) 167).

Section 19(1) imposes specific duties on the sheriff on how to carry out the attachment:

- The sheriff must take into his custody all books of account, invoices, vouchers, business correspondence, and other records relating to the affairs of the insolvent and make a detailed list of what he has collected. If the insolvent is present, the sheriff must ask him whether the list is complete, and record his reply. The sheriff must also endorse on the list any explanation offered by the insolvent about the list or any books or records which he cannot produce. If the insolvent intimates that the list is complete, the books and records referred to in it are, in any criminal proceedings against him under the Act, deemed to be the only books and records maintained by him, unless the contrary is proved (s 19(1)*bis*).

Page 131

- The sheriff must gather any cash, share certificates, bonds, bills of exchange, promissory notes, and other securities. Any cash that he collects must be sent to the Master.
- The sheriff must leave movable property (other than animals) in a room or other suitable place properly sealed up, or appoint someone suitable to hold the property and hand him a copy of the inventory with a notice that the property has been attached under a sequestration order. This notice must contain a statement of the offence and penalty provided for under s 142 of the Act relating to the removing or

concealing of property to defeat attachment or the failure to disclose property. In *Administratrise van die Adriaan Odendaal Kindertrust v Adjunk-Balju, Harrismith en andere (supra)*, it was held that, to make a proper attachment of animals, the sheriff must take them into custody so that he can properly count and classify them. It is not sufficient for him simply to accept a list prepared by the insolvent.

Immediately after making the attachment, the sheriff must report the attachment in writing to the Master and submit with his report a copy of the inventory (s 19(3)(a)). His report must mention any property that he knows is in the lawful possession of a pledgee or a person who has a right to retain it under a *ius retentionis* (lien or right of retention) (*ibid*). As soon as possible after the appointment of the trustee, the sheriff must submit a copy of the inventory to him (s 19(3)(b)).

A sheriff of a magistrate's court who receives a sequestration order from the Registrar is obliged, without delay, to send to the Master an inventory of all property attached by him and known to belong to the insolvent estate (s 19(4)).

8.3 *Curator bonis*

A *curator bonis* may have been appointed after a notice of intention to surrender was published (see 2.4.2). He must continue to act in that capacity even after the estate has been sequestrated, until a provisional trustee or a trustee has been appointed.

The estate assets do not vest in the *curator bonis* at any time: he merely has custody and control of them. They may be attached by the sheriff as described above.

A *curator bonis* is entitled to reasonable remuneration from the estate for his services (s 63(1)), and his fee has to

be paid as part of the costs of sequestration (s 97(2)(c)). It is an established practice to hire someone to do certain administrative work. But the trustee may not pay this employee at estate expense to perform the trustee's ordinary duties (*Pellow v Master of the High Court* 2012 (2) SA 491 (GSJ); cf *Miller & others v Nafcoc Investment Holding Co Ltd & others* 2010 (6) SA 390 (SCA)).

8.4 Provisional trustee

8.4.1 Appointment

A trustee can only be appointed some weeks after a sequestration order is granted. It is often necessary or desirable to have some person in charge of the estate in the meantime, with powers he may exercise in the interests of creditors. For this reason, after provisional or final sequestration has occurred, the Master may follow the Minister's policy and appoint a provisional trustee to the estate to hold office until a trustee is appointed (s 18(1)). Only the Master can make this appointment: the High Court has no inherent power or authority to appoint a provisional trustee or to make recommendations

Page 132

to the Master in this regard (see *Goldfields Trading Co (Pty) Ltd v Schutte* 1956 (3) SA 1 (O) 2; *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) 324; *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* 2012 (3) SA 325 (SCA) 329). Creditors or other interested persons desiring the appointment of a provisional trustee must apply to the Master, setting out the reasons why it is expedient to have a provisional trustee appointed, eg, to

carry on the insolvent's business in the intervening period or sell perishables immediately.

A policy developed by the Minister of Justice and Constitutional Development may be applied when appointing trustees 'to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination' (s 158(2)). The Minister published such a policy in February 2014 and amendments to it in October 2014 (*Government Gazette* No 37287 dated 7 February 2014 with paras 6 and 7 substituted by GN 798 in *Government Gazette* 38088 dated 17 October 2014). The High Court declared the published policy invalid for, among other things, unlawfully fettering the Master's discretion and providing no reasonable likelihood of resolving challenges of corruption or fronting, nor of advancing the transformative agenda required by the Constitution (*SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & others, and another application* 2015 (2) SA 430 (WCC)). The decision was confirmed by the Supreme Court of Appeal (*Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* 2017 (3) SA 95 (SCA)), whose decision, in turn, the Constitutional Court upheld (*Minister of Justice & another v SA Restructuring and Insolvency Practitioners Association & others* 2018 (5) SA 349 (CC)). These decisions were mentioned in *Venter NO & others v The Master of The High Court, Pretoria & others* [2022] ZAGPPHC 578 (8 August 2022). The Master may make discretionary appointments of provisional liquidators (s 368) and co-liquidators (s 374 of the Companies Act 61 of 1973). The applicants (the final liquidators) in *Venter* challenged the legality and rationality of the Master's appointing the second and third respondents as their co-liquidators. The court confirmed that the only relevant policy determined by

the Minister had been set aside in the *SA Restructuring* line of decisions mentioned above. Were the applicants' argument to be upheld in *Venter's* case, the Master would lack discretion, in the absence of the relevant policy, to appoint anyone as a provisional liquidator or as a co-liquidator, with grave consequences for the administration of justice, the Master's Office and insolvency practitioners. Section 15(1A) of the 1973 Companies Act was relied on to resolve the matter. This section enabled the Minister to determine policy for the Master's appointment of provisional liquidators, co-liquidators, liquidators or provisional judicial managers to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination. Clearly, held the court, the policy purpose was to help the Master facilitate this promotion. Appointments of provisional liquidators (s 368) and co-liquidators (s 374) were valid if the Master exercised his discretion consistently with s 15(1A). In *Venter's* case, the Master exercised his discretion when appointing the second and third applicants (under s 368) with the first applicant as provisional liquidator and later the second and third respondents (under s 374) as co-liquidators. Four of the five liquidators appointed in

Venter fell specifically within the class of persons mentioned in s 15(1A) and for whose benefit the policy was to be determined. The court therefore held that the Master had properly exercised his discretion in appointing the second and third respondents as co-liquidators, whose appointments were valid and lawful. The present application sought to prevent the appointment of any further co-liquidators and was self-serving and undermined the purpose of ss 374 and 368. To mark its disapproval, the court awarded attorney and client costs *de bonis propriis*

(from the applicants' own funds), which were not to form part of the liquidation costs.

As a creature of statute, the Master exercises a public power and performs a public function. In *De Wet v Khammissa* 2021 JDR 1070 (SCA), the Master decided to appoint one set of co-liquidators and reject another set, who were still allowed to request reasons for the decision. Communicating this decision placed it in the public domain. The Master was *functus officio*, having discharged his duties. He lacked statutory power to revoke this final, irrevocable decision. His later decision to appoint the previously rejected set of liquidators as co-liquidators with the appointed first set was therefore invalid. A party aggrieved by a decision of the Master may apply to review the decision under s 151 of the Act (*Goldfields Trading Co (Pty) Ltd v Schutte (supra)* 2; cf *SACCAWU v Master of the Supreme Court* [2007] 4 All SA 1034 (T)).

A provisional trustee must give security to the Master's satisfaction for the proper performance of his duties (s 18(1)).

A provisional trustee may also be appointed where a person appointed as a trustee ceases to be or function as one (s 18(1)).

8.4.2 Rights and duties

As soon as possible after his appointment, the provisional trustee must establish whether the sequestration order correctly reflects

- the insolvent's full names, date of birth, identity number (if any) and marital status; and
- if the insolvent is married, the full names, date of birth, and identity number (if any) of his spouse (s 18A).

If any details are lacking or incorrect, the provisional trustee must at once take reasonable steps to obtain the correct particulars. He must then send a certificate containing the particulars along with a copy of the sequestration order and of his appointment to the Master and every Registrar of Deeds (*ibid*).

Under s 18(3), the provisional trustee has a trustee's powers and duties, as provided in the Act, except that

- he may not bring or defend legal proceedings without the court's authority (although, obviously, he has the power to approach the court to obtain authority); and
- he may not sell any estate property without the authority of the Master or the court, and then only after such notice and subject to such conditions as the Master may direct. A sale without prior authority is void and cannot be ratified (*SAI Investments v Van der Schyff NO & others* 1999 (3) SA 340 (N) 350–2).

Page 134

The Master may, at any time, subject to s 18(3), give such directions to the provisional trustee as creditors could give a trustee at a duly convened meeting of creditors (s 18(2)).

Although s 18(3) effectively gives the provisional trustee wide powers, it is accepted that it is not his function to take steps in the winding up of the insolvent estate. His task is simply to take physical control of the estate and preserve it for creditors until a trustee is appointed (*Goodwin Stable Trust v Duohex (Pty) Ltd & another* 1998 (4) SA 606 (C) 620). So the court will not authorize the provisional trustee to institute legal proceedings or sell property, except in special circumstances. In *Warricker & another NNO v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W), Van Oosten J observed (*idem* 276):

'An applicant seeking the authority of the Court in terms of [s 18(3)] . . . must satisfy the Court, on good cause shown, that a departure from the

normal course of events provided for in the Act is warranted. Where the institution of proceedings to enforce a claim is contemplated, to be entitled to an order the applicant must satisfy the Court, first, that some degree of urgency exists; secondly, that the cause of action which is to become the subject-matter of the proceedings is *prima facie* enforceable; and, thirdly, that the interests of creditors in the insolvent estate will not be prejudiced by the earlier institution of proceedings.'

8.4.3 Remuneration

The provisional trustee is entitled to reasonable remuneration from the estate for his services, to be taxed by the Master (ss 1 definition 'trustee', 63(1)) and paid as part of the costs of sequestration (s 97(2)(c)).

It must be noted that although the Act provides for appointing a *curator bonis* and a provisional trustee, neither appointment may be necessary. In such cases, the sheriff may simply attach the property in the manner described above and keep it until the trustee is appointed.

Chapter 9

Meetings of creditors and proof of claims

Synopsis

- 9.1 Meetings of creditors
 - 9.1.1 First meeting
 - 9.1.2 Second meeting
 - 9.1.3 Special meeting
 - 9.1.4 General meeting
 - 9.1.5 General provisions relating to meetings
- 9.2 Proof of claims
 - 9.2.1 Necessity for proof of claims
 - 9.2.2 Time for proof of claims
 - 9.2.3 Procedure for proof of claims
 - 9.2.4 Arrear interest
 - 9.2.5 Conditional debts
 - 9.2.6 Debts payable after sequestration
- 9.3 Voting and resolutions of creditors
 - 9.3.1 Entitlement to vote
 - 9.3.2 Determination of vote
 - 9.3.3 Questions on which creditors may vote
 - 9.3.4 Voting through agent
 - 9.3.5 Resolutions of creditors
 - 9.3.6 Setting aside creditors' resolution

9.1 Meetings of creditors

Through a system of meetings, the insolvent's creditors, among other things, establish their claims, elect a trustee,

and give directions to the trustee on the winding up of the estate. 'Creditors', in this context, means creditors in respect of debts incurred *before* sequestration (cf *Vather v Dhavraj* 1973 (2) SA 232 (N) 236; *Tongaat Paper Co (Pty) Ltd v The Master & others* 2011 (2) SA 17 (KZP) 20). Creditors of the estate whose claims did not exist at the date of sequestration, such as an attorney who has rendered professional services at the instance of the trustee, do not have to prove their claims and have no right to vote at meetings. The amounts due to them are simply paid as part of the costs of sequestration (*Cranko v Borosch's Trustee* 1924 TPD 645 648). The meetings of creditors provide a forum for interaction between the trustee and the creditors and enable creditors to receive information on the course of insolvency proceedings.

There are four different types of creditors' meetings:

- the first meeting;
- the second meeting;
- a special meeting; and
- a general meeting.

Often only the first and second meetings are held.

The Act lays down formalities to be complied with in calling the various meetings. According to *Leyds NO v Simon & others* 1964 (1) SA 377 (T), the prescribed formalities can be waived by creditors, and a resolution taken at an informal meeting is valid if everyone concerned has acquiesced in or condoned the irregularities.

9.1.1 First meeting

On receiving a final sequestration order, the Master must convene immediately, by notice in the *Gazette*, the first meeting of creditors of the estate (s 40(1)). The purpose of

the meeting is to enable creditors of the estate to prove their claims against the estate and elect a trustee (*ibid*). The notice in the *Gazette* must appear at least ten days before the date of the meeting (counting backwards from the date of the meeting and excluding the first day: *Nedcor Bank Ltd v The Master & others* 2002 (1) SA 390 (SCA) 394) and must state the time when and place where it is to be held (s 40(2)). The Master must choose a time and place that he considers most convenient for all parties concerned (s 39(1)). He may, if necessary, alter the time and place of the meeting, provided he gives sufficient notice of the alteration in the *Gazette* (*ibid*).

9.1.2 Second meeting

After the first meeting of creditors and the appointment of a trustee, the Master must fix a date for a second meeting of creditors (s 40(3)(a)). The purpose of this meeting is to enable creditors to prove their claims, receive the trustee's report on the affairs and condition of the estate (see 11.7), and give the trustee directions in connection with the administration of the estate (s 40(3)(a)). Although the Master fixes the date of the meeting, he does not convene it; this is the duty of the trustee, who must publish a notice in the *Gazette* and in one or more newspapers circulating in the district in which the insolvent resides or has his principal place of business (s 40(3)(b)). The notice in the newspaper must be published simultaneously in English and Afrikaans in a newspaper which appears substantially in both languages or, if there is none, in separate newspapers appearing mainly in the language concerned (s 40(3)(c)). The publication in each language must, as far as practicable, occupy the same amount of space (*ibid*). The Act does not stipulate how long before the meeting the notice must be published, but obviously interested parties must be given enough time to attend the meeting and to

decide upon a suitable course of action. The possibility of revising these language requirements to allow for the use of other official languages has been raised (see 1.7.3(ii), first bullet).

9.1.3 Special meeting

A special meeting may be called for either of these purposes:

(i) Proof of claims

After the second meeting, the trustee may be called upon to convene, by notice in the *Gazette*, a special meeting of creditors for the proof of claims against the estate. He must convene the meeting whenever he is required to do so by any interested person who at the same time tenders payment of all expenses to be incurred in connection with the meeting (s 42(1)). (But see 9.2.2 on late proof of claims.)

It has been held that the trustee abuses his powers in terms of s 42(1) if he purports to call a meeting for 'further proof of claims', but his only purpose in convening the meeting is to interrogate the insolvent and other witnesses. In such a case, the meeting is not properly convened (*Marques & another v De Villiers & another NNO* 1990 (4) SA 415 (W)).

(ii) Interrogation of the insolvent

Provided the Master gives his consent, the trustee may at any time, and must, if so required by a creditor who has proved his claim against the estate, convene, by notice in the *Gazette*, a special meeting of creditors for the purpose of interrogating the insolvent (s 42(2); see 13.1.1). Since this provision refers only to an interrogation of the

insolvent, a special meeting cannot be convened for the sole purpose of interrogating persons other than the insolvent (*Bernard v Klein NO* 1990 (2) SA 306 (W) 308).

9.1.4 General meeting

The trustee may at any time convene a meeting of creditors—called a general meeting—for the purpose of giving him instructions on any matter relating to the administration of the estate (s 41), for instance, where the directions given at the second meeting do not cover the matter in question. He must call a general meeting if required to do so by the Master or by creditors representing one-fourth of the value of all claims proved against the estate (*ibid*). A meeting called for the purpose of considering an offer of composition is a general meeting (*Mia v The Master & others* 1940 TPD 86; *Ilic v Parginos* 1985 (1) SA 795 (A) 803). The trustee must call this meeting when he informs creditors of the offer of composition (s 119(5)).

A general meeting must be convened in the same way as the second meeting of creditors, and the notice must state the matters to be dealt with at the meeting (s 41). A general meeting cannot be convened solely for the purpose of 'interrogating witnesses' (*Essop v The Master & another* 1983 (1) SA 926 (C)). But if the meeting is properly called by the trustee 'for the purpose of giving him directions', the interrogation of witnesses can take place at the meeting (*ibid*; *Marques & another v De Villiers & another NNO* 1990 (4) SA 415 (W) 420).

9.1.5 General provisions relating to meetings

(i) Date and venue of meetings

As mentioned above, the Master determines the date and time of the first meeting. The fixing of the dates and times of other meetings is left to the trustee. The presiding officer

has the power to adjourn a meeting from time to time (s 39(5)).

The Act does not provide for the venue of the various meetings, except to require that every meeting must be held at a place accessible to the public (s 39(6)). Meetings are usually held at the office of the Master or magistrate.

(ii) Presiding officer at meetings

If a meeting is held in a district with a Master's Office, the Master or an officer in the public service designated by him must preside over the meeting (s 39(2)). If held in any other district, the meeting must be held according to the Master's directions and must be presided over by the magistrate of the district or by an officer in the public service designated by him (*ibid*). When an officer other than the magistrate presides, he must state in the record of the proceedings the reason for the magistrate's absence (s 39(4)). Any knowledge acquired by the officer in the course of his duties as officer presiding is imputed to the Master (*Wilkins v Potgieter NO & another* 1996 (4) SA 936 (T) 939). The Insolvency Act does not provide for an order that a meeting be held before a presiding officer independent of the offices of the Master or magistrate (*Steelnet (Zimbabwe) Limited v The Master of the High Court Johannesburg* 2008 JDR 0767 (W)).

According to *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC), a presiding officer who is not a judicial officer in the court structure may not commit a recalcitrant examinee in an interrogation to prison (see 13.1.7). It follows that, as a matter of practice, the person called upon to preside over a creditors' meeting in which an interrogation takes place should be a magistrate.

(iii) Record of proceedings

The presiding officer at every meeting must keep a record of the proceedings, certify it at the end of the proceedings, and transmit it to the Master (if not himself the Master) (s 39(3)). The minutes of the meeting constitute *prima facie* evidence of the proceedings (s 68(1)). They are not incontrovertible proof, and there is no bar to the leading of extraneous evidence to establish that the minutes do not correctly record what happened at the meeting and what did, in fact, occur (*Pine Village Home Owners Association Ltd & others v The Master & others* 2001 (2) SA 576 (SE) 580). Unless the contrary is proved, it is presumed that the meeting was duly convened and that all acts done at it (eg, resolutions taken by creditors) were validly performed (s 68(2)).

(iv) Statement privileged

The publication of any statement made at a meeting is privileged to the same extent as the publication of a statement made in a court of law (s 39(6)).

9.2 Proof of claims

9.2.1 Necessity for proof of claims

As a rule, a creditor of the estate has no right to share in the distribution of the assets, vote on matters concerning the administration of the estate, or challenge any of the trustee's actions, unless he has proved a claim against the estate at a meeting of creditors, ie, either the first or second meetings or a special or general meeting. Proof of the claim gives the creditor the required *locus standi* and at the same time provides *prima facie* proof of the existence of the debt (*Grufin Finance Co (Pty) Ltd v Cohen &*

others NNO 1991 (2) SA 345 (W) 348). Certain creditors are relieved of the need to prove claims in the ordinary way, such as an employee of the insolvent, for his preferent claim for salary or wages (see 16.3.2(v)).

A creditor may keep abreast of developments in the estate without proving a claim against it. Section 43 provides that a person who claims to be a creditor of the insolvent estate may, upon payment to the trustee of R25, register his name and address (in the Republic) with the trustee (s 43). From then on, the trustee is obliged to send to that address a notice of every meeting of creditors, a copy of every account that he intends to submit to the Master, and a notice of the date, time and place of the sale of any property over which the creditor has a preferent right under a special mortgage, pledge, right of retention or landlord's hypothec (*ibid*). Failure by the trustee to comply with this section, although a breach of his duties, does not invalidate anything done under the Act (*ibid*).

A creditor of the solvent spouse's estate is only entitled to share in the proceeds of that spouse's assets if the creditor has proved a claim against the insolvent estate in the usual way (s 21(5)). Proof of his claim entitles the creditor to the same rights and remedies, and places him under the same obligations, as a creditor of the insolvent estate, except that

- he is not entitled to share in the separate assets of the insolvent estate (*ibid*);
- he is not liable to make any contribution under s 106 (s 21(9)); and
- he is not entitled to vote at a meeting of creditors of the insolvent estate (*ibid*).

9.2.2 Time for proof of claims

In general, a creditor is entitled to prove his claim at any time before the final distribution of the estate (s 44(1)). But

once a period of three months has elapsed from the closure of the second meeting of creditors, the creditor can only prove his claim if he obtains leave of the Master or the court and pays whatever amount the Master or the court directs to cover the cost occasioned by the late proof (*ibid*). The three-month period stipulated in s 44(1), relating to the proof of claims, applies to both sequestrations and liquidations (*Wishart NO & others v BHP Billiton Energy Coal South Africa (Pty) Ltd & others* 2017 (4) SA 152 (SCA)). In *Cools v The Master & others* 1998 (4) SA 212 (C), the court rejected a contention that the Master might not permit a creditor to prove a claim in terms of s 44(1) after the three-month period had expired if the creditor had no good reason for delaying proof of his claim and, in particular, if the creditor deliberately withheld proof of his claim out of fear that a contribution would be payable by creditors. In the latter regard, Prisman AJ said (*idem* 222):

'It is, in my view, perfectly proper for a creditor to decline to prove a claim whilst there is such fear There is, in my opinion, no basis for attacking the *bona fides* of [the creditor] for holding back proof of his claim until he was satisfied to run the risk of a contribution.'

A creditor who proves his claim after the trustee submits a plan of distribution to the Master is not entitled to share in the proceeds of the assets brought up for distribution in the plan unless the Master allows him to do so (s 104(1)). The Master may, at any time before confirmation of the plan, allow the creditor to share if he is satisfied that the creditor has a reasonable excuse for not proving his claim earlier (*ibid*). If the Master does not so decide, the creditor is entitled to be awarded under any further plan of distribution the amount which he would have received under the earlier plan (a so-called 'equalizing dividend'), provided he satisfies the Master that he has a reasonable excuse for the delay in proving his claim (s 104(2)).

If a creditor knows that proceedings have been instituted to set aside a disposition made by the insolvent before sequestration and delays in proving his claim until judgment has been given in the proceedings, he is not entitled to share in the distribution of any money or the proceeds of any property recovered as a result of the proceedings (*ibid*).

9.2.3 Procedure for proof of claims

Section 44 lays down the procedure for proving claims. Section 44(1) refers to proof of a liquidated claim, but it has been held that the section applies to both liquidated and unliquidated claims (*Cachalia v De Klerk NO and Benjamin NO* 1952 (4) SA 672 (T) 678; *Wynne and Godlonton NNO v Mitchell & another NNO; Wynne and Cornish NNO v Mitchell & another NNO* 1973 (1) SA 283 (E) 290; *Ilic v Parginos* 1985 (1) SA 795 (A) 803; *Klein NO v Kolosus Holdings Ltd & another* 2003 (6) SA 198 (T) 207–9). Although s 44 sets out the procedure according to which all claims in general are to be proved, since the amendment of s 83(5) of the Insolvency Act the provisions of s 44 are rendered inapplicable to a creditor who realises its security for a claim based on a 'master agreement' defined in s 35B(2) of the Insolvency Act. Section 83(10A)(a) now provides for the procedure for such a creditor in relation to the proof of its secured claim (inserted by s 1(c) of the Financial Matters Amendment Act 18 of 2019 GN 799 *Government Gazette* 42482 dated 23 May 2019 and amended by s 3(e), (d) and (c) of the Financial Sector Laws Amendment Act 23 of 2021, GN 2050 *Government Gazette* 46288 dated 29 April 2022).

(i) Documents which must be lodged

A claim must be proved by way of an affidavit corresponding substantially with Forms C or D in the First Schedule to the Act (s 44(4)). Form D is used for claims based on a bill of exchange; Form C for all other claims. The

affidavit may be made by the creditor or any person 'fully cognizant' of the claim (*ibid*). It must set forth the following:

- facts on which the deponent's knowledge of the claim is based;
- the nature and particulars of the claim;
- whether the claim was acquired by cession after the institution of the sequestration proceedings; and
- the nature and details of any security held by the creditor for the claim and, except where the creditor has realized the security under s 83 (see 15.2.4), the amount at which he values it (s 44(4)). When the creditor has realized the security under s 83, he must annex to the affidavit a statement of the proceeds of the realization and of the facts on which he relies for his preference (s 83(5)).

The affidavit is a formal document and must be clear and precise (*Rossouw and Rossouw v Hodgson & others* 1925 AD 97 99 104). When an amount is claimed on more than one ground of indebtedness, the grounds must be separated and particularized so that each can be considered properly (*Marendaz v Smuts* 1966 (4) SA 66 (T)). If the claim is for the price of goods sold and delivered to the insolvent on an open account, the affidavit must be supported by a statement showing the monthly total and containing a brief description of the purchases and payments for the full period of trading or for a period of 12 months immediately before the date of sequestration (whichever is the lesser) (s 44(6)). If the claim is founded on a document, such as an acknowledgment of debt or a mortgage bond, the document, or, in appropriate circumstances, a copy of it,

must be attached to the affidavit (*Taylor and Thorne NNO & others v The Master* 1965 (1) SA 658 (N)).

(ii) Time and place for lodging claim documents

The affidavit and supporting vouchers must be delivered to the office of the presiding officer at least 24 hours before the advertised time of the meeting (s 44(4)). If the required documents are not delivered on time, the claim cannot be admitted to proof at the meeting, unless the presiding officer considers that the creditor could not deliver the documents through no fault on his part (*ibid*). The latter provision is peremptory. In *Derby Shirt Manufacturers (Pty) Ltd v Nel NO & another NO* 1964 (2) SA 599 (D), a creditor delivered his claim documents more than 24 hours before the advertised time of the meeting. Through an oversight, though, he had failed to have the affidavit attested by a commissioner of oaths. He submitted a properly attested affidavit only after the meeting had begun. The presiding officer still accepted it in proof of the claim. The court held that he had acted beyond his powers in doing so. According to *Schurmann v The Master and Paxton NO* 1925 TPD 188, where the creditor has delivered his claim documents in time, but the affidavit or supporting vouchers disclose inadequate information, the presiding officer has the discretion to grant a postponement to enable the creditor to prove his claim in proper form.

(iii) Examination of claim documents by creditors, etc

Creditors, the trustee, the insolvent or their representatives may inspect the claim documents during office hours for nothing (s 44(5)).

(iv) Attendance by creditor

The Act does not require the creditor to attend the meeting to prove his claim. A creditor who has submitted his claim documents in good time (ie, at least 24 hours before the advertised time of the meeting) to the presiding officer is deemed to have tendered proof of his claim at that meeting (s 44(3)). But it may be advisable for the creditor, or his representative, to be present to deal with any queries or objections to the admission of the claim.

(v) Interrogation of creditor

The presiding officer may call upon any person present at the meeting who wishes to prove, or who has proved, a claim against the estate to submit to interrogation, under oath, in regard to the claim (s 44(7)). The interrogation may be conducted by the presiding officer himself or by the trustee or by a creditor who has proved a claim (or by the agent of either of them) (*ibid*). If the claimant is not present at the meeting, the presiding officer may summon him to appear for the purpose of being interrogated (s 44(8)). If he fails without reasonable excuse to appear or, when present, refuses to submit to the interrogation or answer satisfactorily a lawful question put to him, his claim may be rejected by the presiding officer or, if already proved, expunged by the Master (s 44(9)). (The presiding officer, unless himself the Master, has no power to expunge a claim which has been proved.) Convening a meeting solely for the purpose of conducting an interrogation after the relevant claim has been proved would represent an abuse of the process envisaged in ss 44 and 45 (*Eastern Cape Development Corporation v Master of the High Court, Port Elizabeth* 2017 JDR 0577 (ECP) para 23).

(vi) Adjudication on claims by presiding officer

A claim must be proved to the satisfaction of the presiding officer, who must either admit or reject it (s 44(3)). In reaching his decision, the presiding officer performs a quasi-judicial function and must therefore exercise an independent judgement (*Aircondi Refrigeration (Pty) Ltd v Ruskin NO & others* 1981 (1) SA 799 (W) 804). His duty is not to look at the claim cursorily, but to scrutinize it closely to see if it ought to be admitted (*Aspeling & another v Hoffman's Trustee* 1917 TPD 305 307–8). But he must concentrate on the essential allegations of the claim, and should not look for purely technical or formal defects (*Hassim Moti & Co v Insolvent Estate M Joosub and Co* 1927 TPD 778 781). In this case, the presiding officer had rejected a claim made by one Hassim Moti on behalf of the firm, Hassim Moti & Co, because Moti had omitted to state in his affidavit what his means of knowledge were. The claim was based on certain promissory notes made in favour of Hassim Moti & Co. The court set aside the presiding officer's decision. It held that the presiding officer could have inferred from the identity of the names and the fact that Hassim Moti had actually attached the promissory notes to the affidavit that he was either the sole proprietor or a member of Hassim Moti & Co, and thus that he had derived his knowledge of the claim from his connection with the firm. In the court's view, the presiding officer's objection to the claim had been a technical one with 'no real substance' (*idem* 781).

If the claim is on the face of it bad (eg, if it has prescribed), the presiding officer should reject it (*Aspeling & another v Hoffman's Trustee (supra)*). Conversely, if *prima facie* proof of the claim is produced, he should admit it (*Ilsley v De Klerk NO & another* 1934 TPD 55). Unless the claim is on the face of it bad, the presiding officer should not reject it without hearing the creditor's evidence under s 44(7) (*ibid*), or allowing the creditor the opportunity to

present further evidence, as he is entitled to in terms of s 44(7) and to postpone the meeting of creditors for that purpose (*Umbane Technology CC v The Master of the High Court of SA Pretoria Division* 2021 JDR 0697 (GP)). It is not competent for the presiding officer to call for evidence other than that of the creditor for the purpose of deciding whether the claim is genuine and should be admitted. In other words, the creditor is entitled to have his claim considered with no evidence being heard, except his own, in terms of s 44(7) (*Peach v Stewart NO & another* 1929 WLD 228).

The rejection of a claim does not debar the creditor from proving it at a later meeting of creditors or from establishing it by action at law (s 44(3)).

(vii) Trustee's set-off of claims

At common law, set-off operates when 'two parties are mutually indebted to each other [and] both debts [are] liquidated and fully due. . . . The one debt extinguishes the other *pro tanto* [for as much as may be] as effectually as if payment had been made' (*Schierhout v Union Government (Minister of Justice)* 1926 AD 286 289). The arithmetic works as follows: Y owes X R800, and X owes Y R200: when X claims the R800 from Y, Y can set off the R200 and pay X the remaining R600.

Section 46 deals with the position where set-off has happened and one party's estate is later sequestrated. The problem is that without s 46, the other party to the set-off would benefit at the other creditors' expense, because he would receive full or part payment of his claim rather than a proportionate payment as a concurrent creditor (Smith *The Law of Insolvency* 3 ed (1988) 222–3). So if mutual debts have been set off,

wholly or partly, and one party's estate is sequestrated within six months after the set-off has taken place, the trustee may choose to abide by the set-off (s 46).

Alternatively, he may choose to disregard it if two further requirements are met: the set-off was not effected in the ordinary course of business, and the trustee obtains the Master's approval. The trustee then calls on the other party to pay to the estate the debt that he would owe the estate but for the set-off. That party must pay that debt and may prove his claim against the estate as if no set-off had taken place.

However, the set-off is effective and is binding on the trustee if the set-off takes place between an exchange or a market participant as defined in s 35A and any other party in accordance with the rules of such an exchange (see 7.8), or if the set-off takes place under an agreement defined in s 35B (see 7.9): see the proviso to s 46.

Cases on s 46 are rare; it was discussed in *MGG Productions (Pty) Ltd v Ramodike NO & others* 2021 (4) SA 543 (GJ). The mischief that the section sought to curtail was unclear (*idem* 545–6). The interference ultimately by the State (the Master) in setting aside the completed set-off seemed an effective deprivation of property, and it was unclear when this deprivation would not be arbitrary and constitutionally prohibited (s 25 of the Constitution) or when the Master's decision would be reasonably and procedurally fair as s 33(1) of the Constitution required (*idem* 546).

The matters relevant to giving effect to the set-off had to be analysed:

- the background facts leading to the transaction;
- the parties' previous conduct;
- the transaction terms bringing about the set-off; and
- where appropriate, the decision to invoke the set-off.

So 'a contextual approach should be followed to determine if the set-off was effected in the ordinary course of business' (*idem* 549).

Section 29 on voidable dispositions (see 12.2.2(ii)) also contains the phrase 'ordinary course of business'. The requirements of s 29 were discussed, though it was later pointed out that 'set-off is an operation of law and not a disposition within the meaning of the term in the Insolvency Act' (*In re Trans-African Insurance Co Ltd (in Liquidation)* 1958 (4) SA 324 (W) 329—hence our decision to include s 46 in this chapter on the proof of claims, rather than in chapter 12 on impeachable dispositions). From *Al-Kharafi & Sons v Pema & others NNO* 2010 (2) SA 360 (W) also discussing s 29 and s 46, the court in *MGG Productions (Pty) Ltd v Ramodike NO & others (supra)* 543 (headnote) 554 extracted a list of questions to be asked in deciding whether the set-off was 'in the ordinary course of business':

- Was the transaction unique, unusual or anomalous?
- Did it substantially disturb the distribution of the insolvent's assets?
- Were there similar transactions between the parties?
- Was the size of the transaction extraordinary?
- Was the debt disputed?
- Was the debt paid off in a roundabout way?
- Was consideration given for the reciprocal debt?

(viii) Trustee's examination of admitted claims

The admission of a claim by the presiding officer is, in a sense, only provisional because the trustee may still dispute the claim (*Cachalia v De Klerk NO and Benjamin NO*

1952 (4) SA 672 (T) 675). But the admission puts the onus of disproving the existence of the claim on the trustee (*Chappell v The Master & others* 1928 CPD 289 291).

After a meeting of creditors at which claims have been proved, the presiding officer must deliver to the trustee every claim proved along with the documents filed in support of it (s 45(1)). The trustee must examine all available books and documents relating to the estate for the purpose of ascertaining whether the estate, in fact, owes the amount claimed (s 45(2); *Breda NO v Master of the High Court, Kimberley* 2015 JDR 2590 (SCA) para 23). He must, in other words, determine whether the records of the estate reflect the indebtedness which is the subject of the proved claim (*Caldeira v The Master & another* 1996 (1) SA 868 (N) 874). As it was put in *Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA) 426: 'In the scheme of things [trustees] are required to examine all available books and documents for corroboration or comparison.' Although the Act does not say as much, the trustee should also have regard to any other relevant evidence, such as statements of the insolvent or other witnesses regarding the claim (*Standard Bank of SA v The Master of the High Court (supra)* 426). To dispute a claim validly, the trustee must have a reasonable belief, based on facts which he has ascertained, that the insolvent estate is not, in fact, indebted to the creditor concerned: a mere suspicion about the claim does not suffice (*Caldeira v The Master & another (ibid)*; *Standard Bank of SA Ltd v The Master of the High Court* 2009 (5) SA 13 (E) 27; *Standard Bank of SA v The Master of the High Court* 2010 (4) SA 405 (SCA) 440–1). The trustee must also determine whether the claim may be prescribed and allow the claimant to prove that the running of prescription has been delayed or interrupted (*Breda NO v Master of the High Court, Kimberley (supra)*).

If the trustee decides to dispute the claim, he must report this in writing to the Master, stating his reasons (s 45(3)). At the same time, he must give the claimant a

copy of such reasons and notify him that he may, within 14 days, or any longer period as the Master may on application allow, show cause why his claim should not be disallowed or reduced (reg 3(1)). The Master may either confirm the claim or, after allowing the claimant an opportunity to support it—for instance, by calling evidence—reduce or disallow it (s 45(3)). Before expunging a claim, the Master must apply his mind to the reasons given by the trustee—the claim is not expunged simply at the request of the trustee (*Caldeira v The Master & another (supra)* 874). On expunging a claim, the Master must forthwith notify the claimant in writing (s 45(3)).

In *Callinicos v Burman* 1963 (1) SA 489 (A) 500, the court held that the trustee need not follow the procedure for disputing a claim under s 45(3) if the issue is not the amount of the claim, but whether it is a preferent one. In such a case, the trustee may deal with the issue for the first time in his account.

The reduction or disallowance of the claim does not debar the claimant from establishing it by action at law (s 45(3); *P G Bison Ltd v Johannesburg Glassworks (Pty) Ltd (in Liquidation) & others* 2006 (4) SA 535 (W) 541–2; on appeal, *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (in Liquidation) & others* [2008] 1 All SA 473 (W) 488).

(ix) Action to establish disputed claim

The action to establish a claim rejected by the presiding officer or disallowed by the Master lies against the trustee. The creditor does not, for instance, have a right to compel the Master to allow the claim against the estate (*The Master v Stuart* 1981 (2) SA 472 (E)).

Section 75(2) provides that no action in respect of any claim which arose before sequestration may be brought after the Master has confirmed the trustee's account in terms of s 112, unless the court finds that there was a reasonable excuse for the delay. This provision does not apply if this account is not a final one and there are further assets in the estate to be dealt with (*Wilkins v Potgieter NO & another* 1996 (4) SA 936 (T) 941). In this case, a creditor brought an action to have his claim included in the second liquidation and distribution account, which the Master had not yet confirmed. It was held that he need not obtain the court's permission to institute proceedings or offer any excuse for the delay in lodging his claim.

The provision in the Act (ie, s 44(3)), to the effect that the rejection of a claim at a meeting of creditors does not bar an action to enforce the claim, does not mean that a rejection is a prerequisite to such an action. A creditor may sue to enforce his claim even if it has not been rejected by the presiding officer (*Barlows Tractor Co (Pty) Ltd v Townsend* 1996 (2) SA 869 (A) 879). In this case, it was held that a creditor who had sued to enforce his claim after withdrawing it from proof at a meeting of creditors was not deprived of his common-law right to enforce the claim by legal proceedings.

The trustee may, if so authorized by creditors (or the Master, where no creditor has proved a claim), compromise or admit a disputed claim, provided it has been tendered for proof at a meeting of creditors (s 78(3)). One of the objects of allowing creditors to authorize this is to enable them to avoid unnecessary litigation, the cost of which could reduce the estate assets considerably (*Standard Bank of South Africa Ltd v Cato and Gunn NNO & others* 1981 (1) SA 647 (W)). Once a claim has been compromised or admitted, or once it is settled by a judgment of the court, it is deemed to have been proved and admitted against the estate in the

usual way (although the trustee is not debarred from appealing against the judgment, if so authorized by the creditors) (s 78(3)). In *Cachalia v De Klerk NO and Benjamin NO* 1952 (4) SA 672 (T), it was held that the deeming provision in s 78(3) applies only in relation to a claim tendered for proof at a meeting of creditors.

(x) Review of decision on proof of claim

Any person (including a creditor, the insolvent or the trustee: *Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C)) who is aggrieved by the decision of the presiding officer or the Master to admit or reject a claim may apply to court to have the decision reviewed (s 151). A person is aggrieved for these purposes if he is injured or wronged in his rights or interests (*Jeeva & another v Tuck NO & others* 1998 (1) SA 785 (SE) 792), but the term 'person aggrieved' is capable of a wider meaning (see 1.5). The applicant must be aggrieved in this sense as a result of the decision itself—a party cannot apply for a review in terms of s 151 because he is adversely affected by the events which have occurred since the decision was given. In *Jeeva & another v Tuck NO & others (supra)*, the former directors of a company in liquidation, who were due to be interrogated by a creditor and were concerned that information elicited at the interrogation might be used for a criminal charge, applied for a review of the decision admitting the creditor's claim against the company. The court dismissed the application, holding that the directors had not shown that they had any rights which had been adversely affected by the decision.

On review, the court's powers are of the widest kind—it may adjudicate on the claim afresh (*de novo*) (*Talacchi & another v The Master & others* 1997 (1) SA 702 (T))

706–7). It may consider fresh evidence not available to the presiding officer or the Master (*De Jager v Harris NO and the Master* 1957 (1) SA 171 (SWA) 174; *Nel & another NNO v The Master (Absa Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA) 286). See also 1.5.

Another form of redress available would be judicial review of administrative action. The functions of the presiding officer at meetings constitute an 'administrative action' under the Promotion of Administrative Justice Act 3 of 2000 that can be reviewed on the grounds that, for instance, the functions are exercised irrationally or without properly applying the *audi alteram partem* (hear the other side) rule (*Steelnet (Zimbabwe) Limited v The Master of the High Court Johannesburg* 2008 JDR 0767 (W)).

9.2.4 Arrear interest

A creditor may include in his claim arrear interest up to the date of sequestration, provided the interest was payable by agreement or as a result of the insolvent's being in *mora* (default, because of delay without a lawful excuse) (s 50(1)). A secured creditor has a secured claim for no more than two years' interest (s 89(3)) and a concurrent claim for interest that is more than two years in arrears.

9.2.5 Conditional debts

A creditor whose claim against the estate is subject to a condition which has not been fulfilled may prove his claim in the ordinary way (s 48). How the claim is dealt with depends on the time in which the condition may be fulfilled. If the condition is such that it will, if fulfilled at all, be fulfilled within a year of the sequestration, any dividend awarded on the claim must be paid to the Master, who must only pay it to the creditor if the condition is fulfilled; otherwise, he must pay it to the trustee for distribution among the other creditors (s 48(a)). If the condition will not

be fulfilled within a year of the sequestration, or if it may be fulfilled at any time, the creditor may call upon the trustee at a meeting of creditors to place a value on the claim (s 48(b)). The trustee must place a written valuation of the claim together with his reasons for the valuation before the presiding officer at the meeting, who must either admit the claim at a value determined by him or reject it (*ibid*). Irrespective of the presiding officer's decision, where the condition is actually fulfilled before the confirmation of the trustee's account, the creditor may prove his claim as if it had been unconditional (*ibid*).

It has been held that the provisions governing conditional claims do not apply to an unliquidated conditional claim (*Proksch v Die Meester en andere* 1969 (4) SA 567 (A)). A creditor with such a claim is, therefore, obliged to wait for the condition to be fulfilled before he can prove his claim against the estate (*Absa Bank Ltd v Scharrighuisen* 2000 (2) SA 998 (C) 1006). An example of an unliquidated conditional claim is that of a surety for the insolvent where the creditor has proved its claim against the insolvent estate (*ibid*).

A creditor whose claim is subject to a 'subordination' agreement has no claim provable in insolvency. The effect of a subordination agreement is generally that the creditor's claim is enforceable only if the debtor has paid all his other creditors or his assets exceed his liabilities (excluding the subordinated debt). Before sequestration, the creditor's claim continues to exist, although it cannot be enforced until the conditions attached to it have been satisfied. On sequestration, though, the creditor's claim is

extinguished, because the preconditions are no longer capable of fulfilment (*Ex parte De Villiers & another NNO: In*

re Carbon Developments (Pty) Ltd (in Liquidation) 1993 (1) SA 493 (A) 504–5).

9.2.6 Debts payable after sequestration

A conditional debt must be distinguished from a debt that is owed but becomes payable after the date of sequestration. The former may never have to be paid, while the latter will, even though the precise date of payment may be uncertain.

When the creditor's claim relates to a debt which falls due after the date of sequestration, the creditor may prove a claim for the full amount of the debt as if it were payable on the date of sequestration (s 50(2)). The same applies when only part of the debt becomes due after sequestration or where the debt is payable in instalments, some of which fall due after sequestration (*Bassa v The Master & another* 1963 (4) SA 510 (N)). If the debt bears interest, the creditor may, it seems, include in his claim interest up to the date on which the debt falls due, not merely the date of sequestration (cf *Trans-Drakensberg Bank Ltd v The Master & others* 1962 (4) SA 417 (N)).

The Act requires a debt payable after sequestration to be abated if it does not bear interest and a distribution account is confirmed by the Master before the debt becomes due. The trustee must award the creditor whatever sum he would have paid under the distribution account, had the debt been payable on the date of sequestration, less 8 per cent of that amount per year reckoned from the date of sequestration to the due date of the debt (s 50(2)). The same applies to an interest-free debt, part of which falls due after sequestration: the portion that has not become due by the time the distribution account is confirmed must be abated at the rate of 8 per cent per year (*Bassa v The Master & another (supra)*). The latter case concerned an interest-free debt payable in instalments, some due before and some after sequestration. It was held that each

instalment which fell due after confirmation of the trustee's account should be treated as a separate claim and abated at the prescribed rate from the date of sequestration to the due date of that instalment.

9.3 Voting and resolutions of creditors

The creditors give directions to the trustee about the administration of the estate by means of resolutions voted on and passed by them at meetings. The general purpose of creditors' resolutions is to direct the gathering of the available assets and their speedy and effective liquidation in the best interests of the estate (*Jordaan v Richter en andere* 1981 (1) SA 490 (O) 496).

9.3.1 Entitlement to vote

In general, every creditor who has proved a claim against the estate is entitled to vote at a meeting of creditors (s 52(1)). In some cases, a creditor who has proved a claim has no or limited voting power:

- A creditor may not vote on the basis of a claim that he acquired by cession after commencement of the sequestration proceedings (s 52(4)). The purpose of this restriction is apparently to prevent a creditor from gaining control of an insolvent estate by taking cession of claims of other creditors and thus increasing his voting

Page 148

- powers (*Ruskin NO v Speedy Engineering Works (Pty) Ltd & others* 1975 (4) SA 126 (W)).
- A secured creditor may vote up to the full value of his claim on the election of a trustee or any matter affecting his security, but in all other matters, his

voting power is limited to the amount by which his claim exceeds the value which he placed upon his security when proving his claim or, if he did not value his security, the amount obtained on the realization of the security in terms of s 83 (s 52(5)). A remote possibility of prejudice to the security is probably not enough to entitle a secured creditor to vote (*Brigl v The Master & others* 1980 (1) SA 468 (O)).

- A creditor may not vote on whether steps should be taken to contest his claim or preference (s 52(6)).
- A creditor whose claim is conditional has no right to vote if the condition will be fulfilled, if at all, within a year of the sequestration (s 48(a)). If, however, the condition does not fall into this category, the claim is admitted to proof at a valuation and the creditor may vote in respect of that value (see 9.2.5).

9.3.2 Determination of vote

In general, the voting power of a creditor is reckoned according to the value (ie, the amount) of his claim (s 52(2)), and every matter put to a vote is determined by the majority in value of the votes cast (s 53(2)). In the matters of the election of a trustee and the acceptance of an offer of composition, votes are counted according to both value and number (ss 54(4), 119(7)). A claim of less than R1 000 is not considered in a vote by number (s 52(3)).

9.3.3 Questions on which creditors may vote

A creditor may vote (and so pass resolutions) on all matters relating to the administration of the estate, but not on matters relating to the distribution of the assets, except for directing the trustee to contest, compromise or admit a claim against the estate (s 53(1)).

9.3.4 Voting through agent

A creditor may vote through an agent to whom he has given a general power of attorney or special authority to vote (s 53(2)). In *Caledon Trust and Fire Assurance Co Ltd v Magistrate of Riversdale & others* 1937 CPD 349, it was held that special authorization by telegram was sufficient to empower an agent to vote. The legislature has disallowed voting through any of these persons, apparently to curtail touting for trusteeships:

- a person nominated or appointed as trustee,
- his employer or employee,
- his spouse or relative by consanguinity or affinity within the third degree,
- a co-employee working for the same employer, and
- anyone having a direct or indirect pecuniary interest in his remuneration (s 53(2)(a)–(e)).

9.3.5 Resolutions of creditors

Every resolution at a meeting of creditors and the result of the voting on any matter as declared by the presiding officer must be recorded in the minutes of the meeting

Page 149

(s 53(3)). The resolution so recorded is binding upon the trustee, in so far as it is a direction to him (*ibid*). He is not bound by any other direction of creditors (*ibid*). A resolution duly carried at a meeting of creditors is binding on all creditors: a creditor cannot escape the consequences of the resolution on the basis that he was not present or did not vote at the meeting or voted against the resolution (*Trustees of the Insolvent Estate of S W Sutton v H & T McCubbin* (1891) 12 NLR 351; *Slater's Trustee v Smith & Co* (1886) 4 SC 135). But if he withdraws his claim within five days after the date of the resolution, he is deemed to have withdrawn the claim before anything was done under the resolution (s 106(b)).

9.3.6 Setting aside creditors' resolution

The court can set aside a resolution of creditors in these circumstances:

- it was taken irregularly,
- the creditors were not competent to take it (*Jordaan v Richter en andere* 1981 (1) SA 490 (O)), or
- if it was not in good faith, ie, if it was passed, not in the honest belief that it was in the interests of the estate and for the benefit of creditors, but for some collateral object, fraudulent or otherwise (*Paruk & others v Parker, Wood & Co Ltd* 1917 AD 163 168; *Janse van Rensburg v Muller* 1996 (2) SA 557 (A) 564).

And the court may set aside any direction which infringes the rights of a creditor. It may do this at the instance of the creditor himself or at the instance of the trustee with the consent of the Master (s 53(4)). A party who has not proved a claim but who is *prima facie* a creditor of the estate and whose rights are affected by this direction has *locus standi* to seek relief in terms of this section (*Pine Village Home Owners Association Ltd & others v The Master & others* 2001 (2) SA 576 (SE) 581).

Chapter 10

The election of the trustee

Synopsis

- 10.1 Election and appointment
 - 10.1.1 Election
 - 10.1.2 Appointment
 - 10.1.3 Refusal to appoint
 - 10.1.4 Objection to appointment or refusal to appoint
 - 10.1.5 Joint trustees
- 10.2 Persons disqualified from being trustee
 - 10.2.1 Absolute disqualification
 - 10.2.2 Relative disqualification
- 10.3 Vacation of, or removal from, office
 - 10.3.1 Vacation of office
 - 10.3.2 Removal from office by Master
 - 10.3.3 Disqualification or removal from office by court
- 10.4 Resignation and leave of absence
- 10.5 Election of new trustee
- 10.6 Recognition of foreign trustee
- 10.7 Remuneration

10.1 Election and appointment

10.1.1 Election

At the first meeting of creditors, creditors who have proved their claims may elect one or two trustees (s 54(1)). If more than one person is nominated, the individual who

obtains a majority of votes in both number and value must be elected as the sole trustee (s 54(2)). If one person obtains a majority in value, and another person a majority in number, both must be elected trustees (s 54(3)(b)). But if either party declines a joint trusteeship, the other must be elected sole trustee (*ibid*). Should one person obtain a majority of votes in number and no other person obtain a majority in value, or *vice versa*, the party who obtains the majority must be elected as the sole trustee (s 54(3)(a)).

When a trustee is elected at a meeting not presided over by the Master, his election is not valid until confirmed by the Master (s 56(1)).

10.1.2 Appointment

The Master is the only official with the power to appoint the trustee of a sequestrated estate (or the liquidator of a company). A judge is not empowered to make such an appointment or to make recommendations to the Master in this regard (*Ex parte The*

Page 151

Master of the High Court South Africa (North Gauteng) 2011 (5) SA 311 (GNP) 327). Any such appointment is a nullity and need not be set aside (*Master of the High Court NGP v Motala 2012 (3) SA 325 (SCA)*).

The Master may refuse to accept as trustee the person whom the creditors have elected (see 10.1.3). If he does not do so, he must, once the person has given satisfactory security for the proper performance of his duties as trustee, confirm his election and appoint him as trustee by delivering to him a certificate of appointment (s 56(2)). This certificate is valid throughout the Republic (*ibid*). The trustee must then give notice of his appointment and his address in the *Gazette* (s 56(3)).

If the Master considers it desirable to do so, he may, in accordance with policy determined by the Minister, appoint as a co-trustee, with the trustee or trustees of an insolvent estate, a person qualified to act as trustee who has given the security required by s 56(2) (s 57(5)). That appointee is governed by all the provisions of the Insolvency Act concerning a trustee (s 57(6)).

10.1.3 Refusal to appoint

The Master may refuse to confirm the election of a person elected as trustee, or to appoint him as such, if

- he was not properly elected;
- he is disqualified from being a trustee (see 10.2);
- he has failed to give the required security; or
- in the opinion of the Master, he should not be appointed as trustee to the estate in question (s 57(1)).

If the creditors have elected a trustee unlawfully, the Master must not confirm the election and must convene a creditors' meeting to elect another trustee (*Sabie Mediese Sentrum (Edms) Bpk v Die Meester en andere* 1977 (4) SA 389 (T)).

In deciding whether a person is a suitable candidate, the Master should consider his personality, experience, age and diligence, as well as the complexity or otherwise of the problems presented by the estate (*Meskin v The Master & another* 1963 (3) SA 229 (D)). The person must be capable of filling a trustee's position of trust towards creditors and the insolvent, and must be able to act independently, treat creditors equally, and perform his duties without fear, favour or prejudice (*Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA) 407). It has been held that the Master may issue a directive to his staff that a particular person must not be appointed as trustee (*Lipschitz v Watrus NO* 1980 (1) SA 662 (T) 672). In *Ex parte The Master of the High Court South Africa*

(*North Gauteng*) 2011 (5) SA 311 (GNP), the court explained (*idem* 322):

'An organisation [of the nature of the Master's office] has the institutional knowledge and expertise to apply policy, and to assess the ability and integrity of trustees and liquidators, and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate. In . . . *Lipschitz v Watrus NO* 1980 (1) SA 662 (T) . . . the court emphasised the intricacy and volume of work that the master's office has to perform, and recognised that the master keeps lists of the names of potential trustees, liquidators and judicial managers composed of persons who are *prima facie* qualified to be appointed. If the master comes to the bona fide conclusion that a particular person is no longer fit to fulfil the role of provisional trustee, liquidator or judicial manager, he has the power, but also the duty, to prevent such person's appointment.'

Page 152

If the Master declines to confirm a party's election or to appoint him as trustee, he must notify the party in writing and state the reasons for so declining (s 57(1)). If he declines on the ground that, in his opinion, the person concerned should not be appointed as trustee to the estate in question, he need only state this as his reason (*ibid*). Having declined an election or appointment, the Master must convene a meeting of creditors in the manner set out in the Act for the purpose of electing another trustee (s 57(2)).

10.1.4 Objection to appointment or refusal to appoint

Any person aggrieved by

- the appointment of a trustee; or
- the refusal to confirm the election of, or to appoint, a trustee,

may, within seven days from the date of appointment or refusal, request the Master in writing to submit his reasons for the appointment or refusal to the Minister (s 57(7)). The Master must comply with the request within seven days,

submitting along with his reasons any relevant documents, information or objections which he has received (s 57(8)). The Minister may then give appropriate directions in this regard, and his decision is final (s 57(9)–(10)). The right of appeal to the Minister does not exclude the right under s 59 (see 10.3.3) to apply to court for an order declaring a person disqualified from being a trustee or removing him from office (*Jordaan v Richter en 'n ander* 1979 (3) SA 1213 (O)).

10.1.5 Joint trustees

If two or more trustees have been appointed, or if the Master has appointed a co-trustee under s 57(5), they must act jointly in performing their functions as trustees, and they are jointly and severally liable for every act that they perform jointly (s 56(4); *Goldseller v Hill* 1908 TS 822 827). If one co-trustee acts unlawfully without the knowledge or consent of the other, the latter is not liable (cf *Durandt v Fedsure General Insurance Ltd* 2005 (3) SA 350 (SCA)). If co-trustees disagree on any estate matter, it must be referred to the Master, who must determine the issue or give directions on the procedure to be followed for doing so (s 56(5)). Joint trustees may delegate administrative acts to a third party for the latter to perform for them as their subordinate agent, but not matters of discretion that the trustees' office requires them to exercise both jointly and severally (*Miller & others v Nafcoc Investment Holding Co Ltd & others* 2010 (6) SA 390 (SCA) 398).

10.2 Persons disqualified from being trustee

Certain persons are not competent to be appointed trustee in any estate. Others are merely disqualified from being trustee in a particular estate.

10.2.1 Absolute disqualification

These persons may not be trustees in any estate:

- an insolvent;
- a minor or other person under legal disability;
- a person who resides outside the Republic;
- a company, close corporation or other corporate body;
- a former trustee disqualified under s 72;

Page 153

- a person declared by the court under s 59 to be incapacitated for election as trustee (see 10.3.3), while such incapacity lasts, or any person removed by the court from an office of trust on account of misconduct;
- a person who has been convicted of theft, fraud, forgery, uttering or perjury, and who has been sentenced to a term of imprisonment without the option of a fine, or to a fine exceeding R2 000;
- a person who was at any time party to an agreement with a debtor or a creditor under which he undertook that he would, while performing the functions of a trustee, grant or obtain for a debtor or a creditor a benefit not provided for by law; or
- a person who has, by means of misrepresentation, reward, or the offer of any reward, whether direct or indirect, induced or attempted to induce, a person to vote for him as trustee or to assist in having him elected as trustee of any insolvent estate (s 55).

10.2.2 Relative disqualification

These persons are disqualified in respect of a particular estate:

- a person related to the insolvent in blood or by marriage within the third degree;

- a person having an interest opposed to the general interest of the creditors;
- a person who acted as the bookkeeper, accountant or auditor of the insolvent at any time during a period of 12 months immediately preceding the date of sequestration; or
- an agent authorized to vote on behalf of a creditor at a meeting and who acts or purports to act in terms of that authority (s 55).

10.3 Vacation of, or removal from, office

10.3.1 Vacation of office

A trustee must vacate his office:

- if his estate is sequestrated;
- if an order is issued for his detention under the Mental Health Care Act 71 of 2002, or if he is declared by the court to be incapable of managing his own affairs;
- if he is convicted of an offence and sentenced to imprisonment without the option of a fine; or
- if he is convicted of theft, fraud, forgery, uttering a forged document, or perjury (s 58).

10.3.2 Removal from office by Master

The Master may remove a trustee from office on the ground that

- he was not qualified for appointment, or his election or appointment was illegal, or he has become disqualified;
- he has failed to perform any of his duties satisfactorily or to comply with a lawful demand of the Master;
- he is mentally or physically incapable of performing his duties as trustee satisfactorily;

- the majority of creditors has requested in writing that he be removed; or
- he is no longer suitable, in the opinion of the Master, to be the trustee of the estate concerned (s 60).

10.3.3 Disqualification or removal from office by court

On the application of an interested party, the court may declare that the person appointed or proposed as trustee is

- disqualified from holding the office; and
- incapable of being elected or appointed trustee during his lifetime or such other period as the court may determine.

The court may make this order if

- the person has accepted, or expressed his willingness to accept, a benefit from someone who performs work on behalf of the estate (such as a discount allowed by a newspaper in respect of estate advertisements or commission on estate money invested with a financial institution); or
- the person, in order to obtain the vote of any creditor for his appointment as trustee, has
 - wrongfully omitted or included the name of a creditor from any record required by the Act; or
 - given or offered consideration of any kind; or
 - offered to abstain from investigating previous transactions of the insolvent; or
 - split claims for the purpose of increasing the number of votes (s 59).

The court may remove a trustee from office on the grounds of his misconduct as a trustee. The power which the court has at common law to order removal on these grounds has not been displaced by s 60 of the Insolvency Act (*Fey NO*

and Whiteford NO v Serfontein & another 1993 (2) SA 605 (A)).

10.4 Resignation and leave of absence

The Master may allow a trustee to resign on such conditions as he may see fit to impose. He may also allow him to be absent from the Republic, but permission must be obtained only if the trustee will be absent for more than 60 days (s 61).

10.5 Election of new trustee

When a sole trustee or one of two joint trustees vacates his office, is removed from office, resigns or dies, the Master must convene a meeting of creditors to elect a new trustee or co-trustee, as the case may be (s 62(1)–(3)). The Master may appoint a provisional trustee to preserve the estate while the trustee's office is vacant (s 62(2)). The appointment must follow policy determined by the Minister (*ibid*).

10.6 Recognition of foreign trustee

A trustee who has to deal with assets situated in a foreign country must take the necessary steps required by the law of that country to obtain recognition. Similarly, foreign trustees must obtain recognition in the Republic to enable them to deal with assets in the country. This topic is considered further in chapter 29.

10.7 Remuneration

The trustee is entitled to receive reasonable remuneration for his services, which must be taxed by the Master

according to Tariff B in the Second Schedule to the Act (s 63(1));

Gore & another NNO v The Master 2002 (2) SA 283 (E)). He is not entitled to remuneration until the estate account showing the amount to be paid has been confirmed (*R v Macleod* 1935 EDL 284; *Strydom NO v Master of the High Court & another* 2010 (6) SA 630 (GNP) 636). The appropriate stage to consider an increase in the remuneration is at the stage when the liquidation and distribution account, reflecting the work done, is submitted. What has to be determined is the remuneration of the applicants at that specific stage. In *Bester NO v Master of the High Court, Eastern Cape High Court, Port Elizabeth* 2013 JDR 0880 (ECP), the Master's decision to tax down the liquidators' fees to nil since no distribution was made to creditors was set aside. Tariff B allows the trustee's remuneration to be calculated as a specified percentage on specific items (see Appendix 2). So, for instance, the trustee is entitled to 10 per cent of the gross proceeds of the sale of movables (except shares or similar securities) and of the gross amount collected under promissory notes or book debts or as rent, interest or other income. The tariff was last adjusted by the Minister of Justice in 1995, setting a scanty minimum fee of R2 500 (*Klopper NO v The Master* 2009 (3) SA 571 (SCA) 574). Neither the court nor the Master is empowered to rectify inadequacies of the tariff. This matter must be dealt with by the executive branch of government.

The Master may reduce or increase the trustee's taxed remuneration for good cause, or disallow the remuneration, wholly or in part, on account of any failure or delay by the trustee in performing his duties (s 63(1)). The concept of 'good cause' is very wide, and relevant factors will vary

from case to case. In *Nel & another NNO v The Master (Absa Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA), Van Heerden AJA observed (*idem* 285 (original italics)):

'[T]he Master has a duty to satisfy himself or herself as to the reasonableness of the remuneration arrived at by the application of the tariff The concept of "good cause" is very wide [and includes] . . . any factor which may be relevant in determining what constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors *are* relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him or her in the discharge of the duties involved. If, in the winding-up of a company, particular difficulties are experienced by the liquidator because of the nature of the assets or some other similar feature connected with the winding-up, this would undoubtedly constitute "good cause" entitling the Master to *increase* the tariff remuneration. On the other hand, in a situation where, having regard to all the relevant factors, the Master forms the view that the remuneration calculated according to the tariff is excessive in relation to the work done or the responsibility involved, this would likewise entitle the Master—and the Master will be obliged—to depart from the tariff figures by *decreasing* the tariff remuneration to an amount which would be reasonable in the circumstances.'

The time taken for a particular task is not necessarily conclusive: also relevant are the amount of effort required and the degree of complexity of the matter (*Klopper NO v The Master (supra)* 574).

The trustee or any other interested person may take the Master's decision on review (s 151; see also 1.5).

In *Cooper v The Master & others* 1996 (1) SA 962 (N) 967–9, the court accepted these propositions about the Master's allowing an increased fee:

- The trustee need not consult any creditor before applying to the Master for a special

fee (although it may make good sense and be good tactics to consult the major creditors about this subject).

- Co-trustees must consult with each other before application is made for a special fee on behalf of any of them.
- The Master cannot properly exercise his discretion under s 63(1) until all the trustee's services have been rendered and it is known to what extent the estate has benefited thereby.

The court will not lightly interfere with the Master's decision to grant increased remuneration: in general, there must be evidence of *mala fides* (bad faith) or illegality.

The trustee's remuneration may be reduced on the grounds of unsatisfactory performance (*Thorne v The Master* 1964 (3) SA 38 (N)) or misconduct (*Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA) 435).

The Act does not provide for an increase in the amount of remuneration on the ground that there is more than one trustee. In the absence of actual agreement, express or tacit, to the contrary, joint trustees must divide the remuneration between them equally, irrespective of the nature and extent of the services rendered by each (*Cooper v Master of the Supreme Court & others* [1998] 1 All SA 158 (N); *Botha v Swanepoel* 2002 (4) SA 577 (T) 579 581–2).

The trustee is not entitled to any remuneration for services rendered to the estate except that to which he is entitled as a trustee under the Act (s 63(2); *George Hartman & Kie v Landdros, Reitz en andere* 1958 (4) SA 514 (O)). For instance, he may not be paid an auctioneer's commission or receive fees for services rendered as an attorney or conveyancer. The same applies to a partner of

the trustee (s 63(2)). The employer, a fellow employee, and a person in the ordinary employment of the trustee are not entitled to receive remuneration for services rendered to the estate (*ibid*).

The trustee's remuneration must be paid as a cost of sequestration (ss 89(1) and 97(2)(c)).

Chapter 11

The duties and powers of the trustee

Synopsis

- 11.1 Taking charge of assets and documents
- 11.2 Recovery of debts due to estate
- 11.3 Continuation of insolvent's business
- 11.4 Investigation of insolvent's affairs
- 11.5 Receipt book
- 11.6 Estate bank account
- 11.7 Report to creditors
- 11.8 Legal advice and proceedings
- 11.9 Submission of disputes to arbitration

The trustee has the task of collecting and, where necessary, preserving the assets in the estate so that he can realize them for the benefit of creditors. With this task in mind, the Act imposes several specific duties on the trustee and gives him certain powers. These duties and powers are discussed in this chapter. Two aspects of the collection procedure are dealt with in later chapters: impeachable dispositions (chapter 12), and the interrogation of the insolvent and other witnesses (chapter 13). The Act also obliges the insolvent to help the trustee collect the estate assets; these obligations of the insolvent are discussed in chapter 14.

In general, the trustee must be wholly independent and impartial and regard equally the interests of all the creditors (*Goldseller v Hill* 1908 TS 822 835–6; *Standard Bank of South Africa v The Master of the High Court & others* 2010

(4) SA 405 (SCA) 407). He occupies a position of trust towards the insolvent. As sequestration is intended to be to the advantage of creditors, though, the trustee does not act in breach of his position if he takes all lawful steps in his power to ensure that it is the creditors rather than the insolvent who benefit from the sequestration (*Hobson NO v Abib* 1981 (1) SA 556 (N) 560).

If the trustee fails to perform a duty imposed on him by the Act, the Master or a person having an interest in the liquidation or distribution of the estate may, after giving the trustee at least 14 days' notice, apply to the court for an order directing the trustee to perform the duty (s 116bis(1)). Costs awarded to the Master or interested persons are, unless the court orders otherwise, payable by the trustee from his personal funds (*de bonis propriis*) (s 116bis(2)), but the court will not order the trustee to pay from his own pocket unless he has been guilty of improper conduct

(*Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA) 717; *Kroons Gourmet Chickens (Pty) Ltd v The Master of the High Court, Pretoria* 2020 JDR 1034 (GP)).

11.1 Taking charge of assets and documents

As soon as possible after the sheriff has made an inventory under s 19 (see 8.2), the trustee must take possession or control of all movable property, books and documents belonging to the estate, and furnish the Master with a valuation of the movable property by an appraiser appointed under the Act or approved by the Master (s 69(1)). A creditor holding movable property as security

for his claim may, in certain circumstances, retain that property and administer it himself under s 83 (see 15.2.4).

Section 69(3) provides that a magistrate may, on application by the trustee under s 69(2), if it appears from a statement made upon oath that there are reasonable grounds for suspecting that any property, book or document belonging to the insolvent estate is being concealed or otherwise unlawfully withheld from the trustee, issue a warrant to search for and take possession of that property, book or document. The warrant influences affected persons' constitutional rights such as dignity, privacy, freedom, security, trade and property. It must be drafted with care and specificity, then properly executed only by the sheriff and police officers it authorizes (*De Beer NO & others v Magistrate of Dundee NO & others* [2021] 1 All SA 405 (KZP)). Section 69(2) does not oust the High Court's jurisdiction to issue the warrant (*Liesel Venter NO & another v Alba Skrynwerkersgeboue Pty Ltd* [2022] ZANCHC 38 (22 July 2022) paras 12–18). Liquidators may rely on s 69 in order to ensure that goods belonging to the insolvent estate are found, secured and realized under the Insolvency Act and/or the Companies Act 61 of 1973 for the creditors' benefit (*idem* para 21).

The search warrant must be executed in the same way as a warrant to search for stolen property. The executing officer must deliver any article seized to the trustee (s 69(4)). As s 69(4) only requires a warrant to be executed and not issued 'in a like manner as a warrant to search for stolen property', the provisions relating to the issue of warrants in criminal proceedings do not apply to a s 69 warrant (*Naidoo & others v Kalianjee NO & others* 2016 (2) SA 451 (SCA)). The statement on which the magistrate relies need not be made by the trustee, and neither the statement nor the trustee's application for the warrant need be made in writing (*Snyman & others v Simon NO &*

another 2001 (2) SA 998 (W) 1002). The magistrate should call for facts to support the deponent's conclusions—not simply accept them—and he should exercise his discretion on the given facts (*Bruwil Konstruksie (Edms) Bpk v Whitson NO & another* 1980 (4) SA 703 (T) 711). The expression 'reasonable grounds for suspecting' does not mean *prima facie* proof: the yardstick is whether the facts justify a reasonable *suspicion* that property is being concealed or withheld, even though that suspicion may turn out to be wrong (*Philip Business Services CC v De Villiers & others NNO* 1991 (3) SA 552 (T)). It follows that the warrant is not defective only because the property attached does not, in fact, belong to the insolvent estate (*Kerbyn 178 (Pty) Ltd v Van den Heever & others NNO* 2000 (4) SA 804 (W) 811). But the section should not be resorted to where there is a clear, open and reasonable dispute between the possessor and the trustee about whether the property belongs to the insolvent estate and where there is little or no danger of the property's being damaged or no possibility of its being removed (*Advance Mining*

Hydraulics (Pty) Ltd & others v Botes NO & others 2000 (1) SA 815 (T) 822). Once the property has been delivered to the trustee, the authority conferred by the warrant is exhausted. Section 69(3) does not authorize the trustee to remain in possession of the property. Whether or not he may keep possession falls to be decided according to ordinary principles of law, the issue being whether the estate has a right to the property that is sufficient to resist any competing claim to possession (*Kerbyn 178 (Pty) Ltd v Van den Heever & others NNO (supra)* 811–12). If assets delivered to the buyer under a credit sale are later seized under a s 69 warrant, the buyer may bring the *rei vindicatio* (vindictory action) against the property possessor but

must prove ownership (*SV Trading CC v Suliman NO* 2021 JDR 1124 (GP)).

Books and documents recorded on the hard drive of a computer are seizable under s 69. In *Le Roux & others v Viana NO & others* 2008 (2) SA 173 (SCA), Mlambo AJA remarked (*idem* 175):

'The objective of s 69(3) contemplates nothing less than the seizure of property, books and documents relating to the insolvent estate wherever they may be. . . . [P]roperly construed the reference to books and documents in s 69(3) has nothing to do with the form in which those books and documents are. The *Concise Oxford English Dictionary* (10 ed, revised) defines a book as "a set of records or accounts or the embodiment of a record of commercial transactions" and a document as "a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record". That these definitions accord with what the section contemplates cannot be disputed. They also fit in with the context within which one must view the role and functions of a trustee in the scheme of the Insolvency Act. . . . It can hardly be suggested . . . that we should not take judicial notice of the technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed.'

Section 69(3) does not expressly provide for the giving of notice to an affected person. In *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA) 713–14, the majority of the Supreme Court of Appeal pointed out that, since search and seizure may infringe the property and privacy rights of others, a magistrate should not, as a general principle, issue a warrant without observing the principle of *audi alteram partem*—in other words, without giving notice to the person (or persons) affected and allowing him (or them) the opportunity of being heard. But notice to the affected party may be dispensed with where circumstances are such that the object and purpose of the search and seizure provisions would be defeated by giving it (as, for instance, where the party is concealing the property in question). In that case, it may be inferred that the legislature intended to exclude the giving of notice and the concomitant right to be heard. Smalberger JA explained as follows (*idem* 714–15):

`[Section] 69(3) deals with two classes of cases: items . . . "concealed" and items "otherwise unlawfully withheld" "Concealed" . . . connotes items which have been hidden with a view to denying their existence or preventing their recovery. When seeking to recover [such] items . . . the giving of prior notice and affording a right to be heard would, or at least might, defeat the very object and purpose of the section [T]he position is different, however, where the application for a warrant relates to items suspected of being "otherwise unlawfully withheld". These are words of wide import. They could govern situations as widely divergent as where items, though not concealed, are being surreptitiously held, or not disclosed, without any claim of right or for no legitimate reason, to items openly held under a *bona fide* and reasonable claim of right to own or lawfully

Page 160

possess them as against a trustee in his capacity as such [O]ne would need to have regard to the facts of each particular case to determine whether the matter was one where the *audi* principle should have application. Where the circumstances are such that the object and purpose of s 69(3) would be defeated by giving notice, or where the identity of the affected person is not known or cannot reasonably be ascertained, the giving of notice would, by necessary implication, be dispensed with. But in other instances it would not. What must, therefore, in every case be asked, and answered, is whether, having regard to the facts which were known, or must be taken to have been known, when the warrant was applied for, the Legislature must necessarily have intended that the *audi* principle be dispensed with. Unless the answer is an unequivocal "yes", the *audi* principle must be complied with by giving notice to the affected person to enable such person to be heard.'

Besides a warrant under s 69(2), the trustee may obtain an interdict to prevent the dissipation of assets (such as funds) being withheld from the insolvent estate, pending proceedings for the delivery of the assets to the estate. Because an anti-dissipation order is quasi-vindictory, the trustee need not show either an intention to dissipate on the part of the possessor or a well-grounded apprehension of irreparable harm, there being a presumption of such harm until proved otherwise (*Fey NO v Van der Westhuizen & others* 2005 (2) SA 236 (C) 249–50).

The trustee must also take charge of any immovable property vesting in the estate (*Kahan NO v Hydro Holdings*

(*Pty*) Ltd 1980 (3) SA 511 (T) 514). So he is entitled to the undisturbed possession and control of estate property over which a lien-holder is exercising a lien (*Roux en andere v Van Rensburg NO* 1996 (4) SA 271 (A)). The trustee may, with the Master's written consent, give notice to the Registrar of Deeds to enter a *caveat* (a warning notice) against the transfer of immovable property, or the cancellation or cession of a bond, registered in the name of the insolvent or his spouse (s 18B(1)). The notice must be accompanied by the Master's written consent and must identify sufficiently the person to whom and the property or bond to which the *caveat* will apply (s 18B(2)). The *caveat* remains effective until the date indicated by the Master in his consent (s 18B(3)).

At any time before the second meeting of creditors, the trustee may, with the Master's consent, allow the insolvent such sum of money or quantity of goods out of the assets of the estate as appears to the trustee to be necessary for the support of the insolvent and his dependants (s 79).

11.2 Recovery of debts due to estate

In the notice in which the trustee gives notification of his appointment, he must call upon all persons indebted to the estate to pay their debts within a time and at a place mentioned in the notice (s 77). Should payment not be forthcoming, the trustee must immediately recover the debt, by legal proceedings if necessary (*ibid*). It would seem that the trustee need not send a letter of demand to each debtor individually. Nor is there provision for accelerating the payment of debts that fall due after the date of sequestration: these debts need only be paid on the due dates.

If a debtor cannot pay in full, the trustee may accept a reasonable part of the debt in discharge of the whole debt

(s 78(1)). If the debt exceeds R2 000, the trustee may compound it only if authorized to do so by the creditors or, where no creditor has proved a claim, the Master (*ibid*). (In this context, the word 'compound' means to settle a debt by agreement for part payment.) It is not competent for the creditors or the Master to

give general instructions to the trustee about the compounding of debts. Each debt exceeding R2 000 must be considered separately, and the trustee must be given specific instructions on how the debt is to be discharged (*George Hartman & Kie v Landdros, Reitz en andere* 1958 (4) SA 514 (O)).

The trustee may grant a debtor an extension of time for payment, provided the extension does not go beyond the final date for submission of the account under s 91 of the Act (s 78(1)). The account under s 91 is the liquidation account (see 17.1; 17.2.1).

If a debtor pays the insolvent, the payment is of no effect unless the debtor proves that it was made in good faith and without knowledge of the sequestration (s 22).

11.3 Continuation of insolvent's business

The trustee must realize the estate assets as speedily as possible and so has no automatic right to carry on the insolvent's business (*Klatzkin v Noble NO* 1915 AD 713 717). He may do so only if authorized by the creditors or, in the absence of instructions from them, by the Master (s 80(1)). The costs of then continuing the business are costs of administration (s 97(2)(c)). If the trustee continues the business without authority, the estate cannot be saddled

with any loss or additional expenditure resulting from his actions (*Consolidated Caterers Ltd v Patterson NO 1960* (4) SA 194 (E)).

The Master may give authority to continue the insolvent's business at any time, whether before or after the second meeting of creditors (s 80(1)). It would appear that authority may be given by creditors *ex post facto*, ie, by way of a resolution ratifying actions already taken by the trustee. In *Klatzkin v Noble NO (supra)*, where the trustee had continued running the insolvent's business in compliance with the principal creditors' wishes, it was held that the later ratification of the trustee's actions by creditors at a meeting removed 'any doubt that there might have been as to the power of the trustee to carry on the business without a formal resolution of creditors' (*idem* 717).

The authority given may only be to continue the business temporarily for the purpose of its being wound up: eg, to preserve its goodwill so that it can be sold as a going concern (cf *Klatzkin v Noble NO (ibid)*). Authority cannot be granted to continue the business indefinitely in order to make a profit out of it (*Thorne v The Master 1964* (3) SA 38 (N) 50–1). In *Marshall Bros Trustee v Transvaalsche Bank 1907 TS 1060*, the insolvent estate consisted of certain base-metal claims, and buildings and machinery for working clay situated on the claims. The majority of creditors resolved that the claims and machinery should not be sold until they had been brought into good working order as a going concern (a task requiring considerable work and expenditure) and, even then, not without first obtaining the sanction of creditors at a special meeting to be convened at a later date. It was held that it was not permissible for creditors to postpone the sale of the assets to a date to be fixed by them and thus that the resolution to this effect could not stand.

When the trustee is given authority to carry on the business, he must, unless otherwise directed by creditors, purchase any goods required for the business for cash and from the takings of the business only (s 80(2)). He is entitled to employ whatever assistance is reasonably necessary to enable him to carry on the business (*Klatzkin v Noble NO (supra)* 717).

The trading account that the trustee must draw up after carrying on a business on behalf of the estate is discussed in a later chapter (see 17.1.2).

11.4 Investigation of insolvent's affairs

The trustee must investigate the affairs and transactions of the insolvent before the sequestration of his estate (s 81(1)). The purpose of the investigation is to enable the trustee to report to creditors on the insolvent's affairs and transactions and on any matter of importance relating to the insolvent or the estate (see 11.7 about the report which the trustee must prepare). To assist him in his investigation, the trustee may call upon the insolvent in writing to give a true, clear and detailed explanation of his insolvency and to account correctly and in detail for the excess of his liabilities over his assets (s 138(b)). The trustee also has the right to inspect and obtain certified copies of all the insolvent's income tax returns (s 81(2)). A return certified as correct is admissible on its mere production in any civil or criminal proceedings (*ibid*).

11.5 Receipt book

Immediately after his appointment, the trustee must open a book in which he must enter, as soon as possible, a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the estate (s 71(1)). The Master, every creditor who has proved a claim, and, if the Master so orders, any person claiming to be a creditor or a surety for the trustee may inspect the book at all reasonable times (s 71(2)).

11.6 Estate bank account

The trustee must open a cheque (now a current) account in the name of the estate with a bank in the Republic and must deposit in the account, from time to time, all sums which he receives on behalf of the estate (s 70(1)(a)). If he retains an amount of estate money exceeding R40 after the earliest day on which he could have deposited it, he is liable to pay into the estate double the amount retained (s 72(1); cf *Matsepe NO & others v Master of the High Court, Bloemfontein & another* [2019] JOL 44812 (FB); *Standard Bank of South Africa Ltd v Master of the High Court, Eastern Cape, Port Elizabeth & others* [2018] 4 All SA 871 (ECP)). The same applies if the trustee knowingly allows a co-trustee to retain estate money (s 72(1)). The trustee may take moneys from the cheque account which are not immediately required for the payment of any claim against the estate and place them in a savings account or in an interest-bearing deposit with a bank (or mutual bank) in the Republic (s 70(1)(b)–(c)). If required by the Master to do so, the trustee must notify him in writing of the branch of the bank (or mutual bank) where he has opened an account and he must furnish the Master with a bank statement or other evidence of the state of the account (s 70(2)). The trustee may not transfer any account from that branch except after written notice to the Master (s 70(3)). Considering that the provision in s 70(4) that all cheques or

orders drawn upon an account must contain the name of the payee and the cause of payment and must be drawn to order and be signed by every trustee or duly authorized agent, it could be argued that electronic fund transfers are not permitted. It is submitted that s 70(4) deals with payment by cheque and does not as such prohibit electronic fund transfers. The Chief Master has issued a directive (Chief Master's Directive 5 of 2012, para 3.2, effective from 17 July 2012) which reads:

Page 163

'Payment by an Estate Representative [defined to include a trustee and a liquidator], other than by cheque (for instance EFT), is accepted subject to the following:

- 3.2.1 The Estate Representative is responsible to ensure that all payments made are lawful;
- 3.2.2 Every payment must contain the name of the payee, the cause of payment and other requirements specific to that payment e.g. the reference number and the name of [the] Master's Office in respect of Master's Fees;
Payments may only be made to a bank account designated by the payee.
- 3.2.3 An affidavit contemplated by section 35(12) of the Administration of Estates Act 1965 by the Estate Representative, in which he or she declares that a creditor was paid or that an heir received his or her share may be accepted by the Master in lieu of a receipt by the beneficiary.'

The Master, and any surety for the trustee, has the same right as the trustee to information about the account and may examine all vouchers in relation to the account, whether in the hands of the bank (or mutual bank) or the trustee (s 70(5)). After notice to the trustee, the Master may direct the manager of a branch where an account has been opened to pay into the Guardian's Fund all moneys standing to the credit of the account, or which may later be paid into it (s 70(6)).

11.7 Report to creditors

After investigating the insolvent's affairs and transactions, the trustee must submit a full written report to creditors (s 81(1)). He must do this

- at the second meeting of creditors; or
- at an adjournment of the second meeting, provided he has obtained the Master's written permission before the second meeting; or
- if an offer of composition has been accepted by creditors, within one month after the acceptance of the offer (*ibid*).

The report must deal with the affairs and transactions of the insolvent and any matter of importance relating to the insolvent or the estate (*ibid*). In particular, the report must deal with the following (s 81(1)(a)–(i)):

- the assets and liabilities of the insolvent;
- the cause of the debtor's insolvency;
- the books relating to the insolvent's affairs and whether he has kept a proper record of his transactions (and if not, the respects in which the record is deficient);
- whether the insolvent appears to have contravened the Act or any other law—the trustee must include in the report all the facts relating to the alleged offence and must furnish any further information later called for by the Master or the Director of Public Prosecutions (s 81(4));
- any allowance paid by the trustee to the insolvent and his reasons for paying it;
- any business which the trustee has been continuing on behalf of the estate, any goods which he has purchased for the business, and the result of carrying on the business;
- any legal proceedings pending or threatened against the estate;

- any uncompleted acquisition of immovable property by the insolvent or current lease entered into by the insolvent as lessee; and
- any matter relating to the administration or realization of the estate requiring the direction of creditors.

At least 14 days before the meeting at which the report is to be submitted, the trustee must send by registered post to each creditor whose name and address he knows a copy of the report, of the sheriff's inventory, and of the valuation of the movable property which he (the trustee) has furnished to the Master (s 81(1)*bis(a)*). With the report, the trustee must submit recommendations regarding any resolution or direction which he considers ought to be passed or given at the meeting (*ibid*). At least 24 hours before the meeting, the trustee must submit to the presiding officer an affidavit setting out the names and addresses of the creditors to whom he has sent copies of the report and other documents and containing full details of his recommendations (s 81(1)*bis(b)*).

The creditors at the second meeting may direct what action must be taken by the trustee in respect of any matter reported to them (s 81(3)(a)). If they give no directions, the trustee's recommendations that the creditors could have lawfully accepted are deemed to have been adopted by them if the Master approves (s 81(3)(b)). And the Master may give whatever directions he thinks fit relating to any matter in the trustee's report or the administration or realization of the estate (s 81(3)(c)).

11.8 Legal advice and proceedings

Under s 73(1), the trustee may engage the services of an attorney or counsel to perform legal work on behalf of the

estate. The section provides that the trustee must obtain prior written authorization from the creditors specifying the legal work in question or, if this is not feasible because of the urgency of the matter or the number of creditors involved, from the Master. But the section then states (in s 73(1)(b)) that if it is unlikely that there will be any surplus after the distribution of the estate, the trustee may, at any time before submitting his accounts, obtain written authorization from creditors for any legal work performed by an attorney or counsel. Since there is seldom any prospect of a surplus after the distribution of the estate, it seems that the trustee will, in nearly all cases, be entitled to seek and obtain authorization *ex post facto* (done afterwards and operating retrospectively) for engaging an attorney or counsel on behalf of the estate.

Any costs which the trustee incurs in having legal work done on behalf of the estate (including any costs awarded against the estate in legal proceedings) are included in the costs of the sequestration of the estate (s 73(1)). The fees of an attorney or counsel engaged by the trustee are not subject to taxation by the taxing master (or assessment by the relevant law society or bar council) if the trustee has agreed in writing that they are to be determined according to a specific tariff and there is no dispute over the fees payable under such an agreement (s 73(2)–(3)). A contingency fees agreement mentioned in s 2(1) of the Contingency Fees Act 66 of 1997 is binding on the estate only if the creditors have given express prior written authorization to the trustee to conclude the agreement (s 73(2) of the Insolvency Act). The Master may disallow any costs incurred by the trustee if he considers that they are incorrect or improper or that the trustee acted in bad faith, negligently or unreasonably in incurring them (s 73(5)).

A majority of creditors (reckoned in number and in value) may direct the trustee to employ or not to employ a particular attorney in connection with the administration of the estate (s 53(5)). If the trustee has reason to believe that it will not be in the best interests of the estate to carry out the direction, he may submit the matter to the Master, whose decision, after considering any representations in writing by the trustee and the creditors, is final (*ibid*).

The trustee's failure to obtain the required authorization for the institution or defence of legal proceedings would not appear to invalidate the steps that he has taken in the legal proceedings (cf *Patel v Paruk's Trustee* 1944 AD 469 475) or render him personally liable for costs incurred (cf *Re Estate Potgieter* 1908 TS 982). In the latter regard, it seems that he may only be ordered to pay costs from his own funds (*de bonis propriis*) if he acted in bad faith, negligently or unreasonably.

11.9 Submission of disputes to arbitration

The trustee may submit a dispute concerning the estate to the determination of arbitrators, provided he is authorized to do so by the creditors or, where no creditor has proved a claim, by the Master, and provided the other party to the dispute has consented to arbitration (s 78(2)).

Chapter 12

Impeachable dispositions

Synopsis

- 12.1 Meaning of 'disposition'
- 12.2 Dispositions which may be set aside
 - 12.2.1 Disposition made not for value
 - 12.2.2 Disposition which prefers one creditor above another: voidable preference
 - 12.2.3 Disposition intended to prefer one creditor: undue preference
 - 12.2.4 Collusive disposition which prejudices creditors or prefers one creditor
 - 12.2.5 Disposition in fraud of creditors (*actio Pauliana*)
- 12.3 Proceedings to set aside voidable disposition
 - 12.3.1 Who may sue
 - 12.3.2 Jurisdiction of court
 - 12.3.3 Time for bringing proceedings
 - 12.3.4 Interim relief
 - 12.3.5 Evidence
 - 12.3.6 Prescription of claim
- 12.4 Order setting aside disposition
 - 12.4.1 Recovery of any property alienated
 - 12.4.2 Execution on court's judgment
 - 12.4.3 Indemnity to *bona fide* recipient of disposition
 - 12.4.4 Effect of order on underlying debt
- 12.5 Exemption of certain dispositions from Act
- 12.6 Transfer of business without prescribed notice

- 12.7 Transfer of business after proceedings instituted
- 12.8 Suggestions for visual learners using diagrams and timelines

Besides being vested with the property belonging to the insolvent at the time of sequestration, the trustee has the means of recovering certain property alienated (ie, whose ownership was transferred to some other person) by the insolvent before his sequestration. The trustee may ask the court to set aside certain dispositions made by the insolvent before sequestration and may, in certain circumstances, treat as void the transfer by the insolvent of his business before sequestration. These topics are discussed in this chapter.

12.1 Meaning of 'disposition'

According to s 2, the term 'disposition' means 'any transfer or abandonment of rights to property, and includes a sale, lease, mortgage, pledge, delivery, payment, release,

Page 167

compromise, donation, or any other contract therefor, but does not include a disposition in compliance with an order of the court . . .'. The following should be noted in this regard:

- 'Property', according to s 2, means movable or immovable property, wherever situated within the Republic, and includes a contingent interest in property other than the contingent interest of a fideicommissary heir or legatee. The definition includes foreign assets: the purpose of the expression 'wherever situated within the Republic' is not to limit the operation of a sequestration order to property within the Republic, but to extend the operation of the sequestration order to property beyond the territorial limits of the court which granted the order (*Sackstein*

NO v Proudfoot SA (Pty) Ltd 2003 (4) SA 348 (SCA) 358–9). So the word 'property' includes property situated outside the Republic. For the discussion of property in cross-border insolvency law, see chapter 29.

- There was formerly some uncertainty over whether the repudiation of an inheritance (ie, a bequest or legacy) or insurance benefit amounts to a disposition for the purposes of the Act (see, eg, *Boland Bank Bpk v Du Plessis* 1995 (4) SA 113 (T) in which it was held that it does; but cf *Kellerman NO v Van Vuren & others* 1994 (4) SA 336 (T); *Klerck and Schärages NNO v Lee & others* 1995 (3) SA 340 (SE); *Simon NO & others v Mitsui and Co Ltd & others* 1997 (2) SA 475 (W) 520; *Durandt NO v Pienaar NO & others* 2000 (4) SA 869 (C) in which the contrary view was adopted). The Supreme Court of Appeal has now decided authoritatively that the beneficiary in this type of case merely has a competence or power to accept the inheritance or benefit in question and that until the beneficiary does so, it does not form part of his estate (*Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA) 928; see 5.2). So, in repudiating (ie, refusing to accept) the inheritance or benefit, the beneficiary does not abandon any property right. For the same reason, a change of beneficiary under a life insurance policy from the insured to a third party does not amount to a disposition by the insured. Nomination of the third-party beneficiary merely gives him a power or competence. So it is not a transfer or abandonment of any right under the policy (cf *Love & another v Santam Life Insurance Ltd & another* 2004 (3) SA 445 (SE) 448–9; see 5.3.8(ii)).
- A 'disposition' includes a contract providing for the alienation or abandonment of rights to property (*Estate Jager v Whittaker & another* 1944 AD

246 250, cited with approval in *Nel v Bank of Baroda* 2016 JDR 0871 (KZD) para 7; *Sackstein NO v Van der Westhuizen en 'n ander* 1996 (2) SA 431 (O) 436; *Jackson v Louw NO* 2019 JDR 0015 (ECG) para 33). This is sometimes referred to as an 'uncompleted' disposition (see, eg, s 26(2)). A contract of suretyship, although not specifically mentioned in the definition, is a disposition since it is a contract which provides for a payment by the debtor (*Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 (2) SA 597 (A) 602). Further examples of transactions which have been held to be dispositions are the issuing of a cheque by the insolvent, both where his bank account is in credit (*De Villiers NO v Kaplan* 1960 (4) SA 476 (C)) and where he has been granted overdraft facilities (*Rousseau NO v Standard Bank of SA Ltd* 1976 (4) SA 104 (C)); a contract between the insolvent and a party indebted to him in terms of which the latter must pay the amount of the debt to a creditor of the insolvent (cf *Standard Finance Corporation of South Africa Ltd (in Liquidation) v Greenstein* 1964 (3) SA 573 (A)); and an arrangement by which a party who has

agreed to lend money to the insolvent is required to pay the amount of the loan into the bank account of a third person for the purpose of channelling the amount to a creditor of the insolvent (*Van Zyl & others NNO v Turner & another NNO* 1998 (2) SA 236 (C)).

- The term 'disposition' does not include a disposition made in compliance with an order of court, eg, the payment of a contractual debt or the delivery of property as ordered by the court (cf *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) 944–5), even if the

insolvent chose not to oppose those proceedings (*Simon NO & others v Mitsui and Co Ltd & others (supra)* 520), or the order was obtained by agreement, ie, in terms of a consent paper (*Dabelstein & others v Lane & Fey NNO* 2001 (1) SA 1222 (SCA) 1228). But this exclusion does not apply (and so the disposition qualifies as a disposition for the purposes of the Act) if the creditor obtained the court order by fraud or by collusion with the insolvent and with the intention of prejudicing other creditors (*Sackstein en Venter NNO v Greyling* 1990 (2) SA 323 (O)). The onus of proving fraud or collusion lies on the party seeking to set aside the disposition (*Dabelstein & others v Lane & Fey NNO (supra)*).

- The disposition must be made before the sequestration. The earlier the date of sequestration, the greater the number of dispositions hit by the relevant statutory provisions (*Afrisam (South Africa) Proprietary Limited v Maleth Investment Fund Proprietary Limited* 2019 JDR 2519 (SCA) para 20).
- As for the maker of the disposition, *Zwarts v Janse Van Rensburg* 2011 JDR 0514 (SCA) concerned the identification of the debtor with whom the appellant contracted and who paid him the dividends of his investment in a pyramid scheme. He contracted with the corporate entities running the scheme's business from time to time. The debtor that made the disposition was treated as the consolidated estate into which each of these corporate entities had been subsumed.

12.2 Dispositions which may be set aside

The dispositions which may be set aside are those

- made not for value;
- having the effect of preferring one creditor above another (ie, voidable preferences);
- intended to prefer one creditor above another (ie, undue preferences);
- made in collusion with another person and having the effect of prejudicing creditors or preferring one above another; and
- made *in fraudem creditorum* (in fraud of creditors).

The first four types are voidable in terms of the Insolvency Act (ss 26, 29, 30 and 31); the last (made in fraud of creditors) may be set aside in terms of the common law. In practice, dispositions often fall into more than one category (cf *M & another v Murray NO & others* 2020 (6) SA 55 (SCA) 65), and the particulars of claim may be expressed in the alternative (cf cases on pyramid schemes (*Fourie NO & others v Edeling NO & others* [2005] 4 All SA 393 (SCA); *Gainsford NO v Rees* 2014 JDR 1492 (GJ)). Until a disposition is set aside by the court, it remains valid and binding (cf *Harcourt v Eastman NO* 1953 (2) SA 424 (N) 428; *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A) 743).

Only dispositions made by the insolvent are impeachable under the Act. So a disposition made by the insolvent's bank without his authority does not qualify

(*Zamzar Trading (Pty) Ltd (in Liquidation) v Standard Bank of SA Ltd* 2001 (2) SA 508 (W) 515).

12.2.1 Disposition made not for value

(i) What must be proved

Section 26(1) empowers the court to set aside a disposition made for no value. The trustee must prove that the insolvent made the disposition, when he made it, and that he received no value for it (*Rousseau & others NNO v Visser & another* 1989 (2) SA 289 (C) 307; *Louw NO v DMA Fishing Enterprises (Pty) Ltd & another* 2002 (2) SA 163 (SE)). If the disposition was made more than two years before sequestration, the court can only set it aside if the trustee also proves that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets (s 26(1)(a)). If the disposition was made within two years of sequestration, the court must set the disposition aside unless the person claiming under or benefited by the disposition proves that, immediately after it was made, the assets of the insolvent exceeded his liabilities (s 26(1)(b); *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever NO* 2012 JDR 2303 (SCA) paras 39–40, the recipient proving that the insolvent's assets exceeded its liabilities).

The trustee must also prove that the recipient of the disposition benefited from the disposition (*Van Wyk Van Heerden Attorneys v Gore NO & another* [2022] ZASCA 128 (30 September 2022) para 26). An attorney who receives money deposited into his trust account for on-payment to another person under his client's mandate instructions is a mere conduit for the payment, and the attorney does not himself benefit from the client's disposition of the money for the purposes of s 26 (*idem* paras 37–9). But if the attorney uses money deposited into his trust account by appropriating it to settle his fees and pay disbursements incurred on the client's behalf, the attorney does benefit from this disposition (*idem* 40–1). Then the attorney bears the full onus of proving that, immediately after the client made the disposition (the deposit of the money) into the attorney's trust account, the client's assets exceeded his

liabilities. This is a full onus of proof, not a mere duty to adduce evidence (*idem* para 42).

It is unnecessary to establish whether the insolvent intended to prejudice creditors by making the disposition: the object of s 26 is simply to prevent a person in insolvent circumstances from impoverishing his estate by giving away assets without receiving any appreciable advantage in return (cf *Estate Wege v Strauss* 1932 AD 76 84).

'Value' in s 26 means a benefit received or promised as a *quid pro quo* (ie, something given or exchanged in return for another thing) (*Estate Jager v Whittaker & another* 1944 AD 246 250), either by the recipient of the disposition or by someone else (*Hurley and Seymour NO v W H Muller & Co* 1924 NPD 121). Examples of dispositions not for value are a donation (*Estate Jager v Whittaker & another* (*supra*)) and a payment for a promise that the promisor cannot be compelled to carry out (*Harcourt v Eastman NO* 1953 (2) SA 424 (N)). A disposition not for value means a disposition for no value at all (*Strydom NO & others v Snowball Wealth (Pty) Ltd & others* [2022] ZASCA 91 (15 June 2022) paras 25 and 36). In *Strydom's* case, shares had been sold for less than their reasonable market value, but this did not mean that they had been disposed of for no value at all. The court explained (*idem* para 32) that

Page 170

'there is nothing inherently, commercially or morally objectionable to a sale at a discounted price. The same cannot be said of a factually insolvent person squandering or giving away assets for no return. [Section] 26(1) was intended to apply only to gratuitous dispositions.'

So s 26 did not apply to these dispositions, and the sales of shares were allowed to stand. To qualify as 'value', the reciprocal benefit need not be a monetary or tangible one (*Goode, Durrant & Murray Ltd v Hewitt and Cornell NNO* 1961 (4) SA 286 (N) 291). In *Estate Wege v Strauss*

(*supra*), for example, being allowed to remain a member of Tattersall's was held to be value. It is possible that the benefit may not have a reasonable market value, and that a fair return or equivalent may not be capable of evaluation or expression in monetary terms (*Strydom NO & others v Snowball Wealth (Pty) Ltd & others (supra)* para 34). But the benefit must be adequate (*Terblanche NO v Baxtrans CC & another* 1998 (3) SA 912 (C) 916–17; *Cronje NO v De Paiva* [1997] 2 All SA 80 (B) 86). So, for example, the sale of property for a nominal or trifling amount would be a disposition without value (*Bloom's Trustee v Fourie* 1921 TPD 599 601). In *Commissioner for Inland Revenue v Bowman NO* 1990 (3) SA 311 (A), the liquidator of a company sued to set aside payments by the company in respect of income tax as dispositions without value. The tax had been assessed on the basis of fictitious income, and, in fact, no tax had been payable. The court rejected a suggestion that the services provided by the State with income tax revenue could be seen as value for the purposes of s 26. Goldstone AJA said (*idem* 317):

'The benefit which the taxpayer may enjoy from the manner in which the State spends revenue collected by the Commissioner appears . . . too speculative and tenuous to be regarded as "value" within the meaning of s 26(1).'

Payment of a lawful debt is not a payment without value because the payer receives counter-value in the form of a discharge of his liability (*Estate Jager v Whittaker & another (supra)* 250–1; cf *Alley Cat Clothing (Pty) Ltd v De Lisle Weare Racing* [2002] 1 All SA 123 (D) 135, in which this principle was applied to the payment of a gambling debt). Performance in terms of an illegal agreement can, it seems, qualify as 'value', provided the performance has actually been rendered (*Visser en 'n ander v Rousseau en andere NNO* 1990 (1) SA 139 (A) 154–5 (*obiter*)). But a loan by a lender not registered as a credit provider under the National Credit Act 34 of 2005 is void. So the interest paid by the

insolvent on that illegal loan is a donation voidable under s 26 (*Engelbrecht NO & others v Du Toit* [2020] ZAWCHC 119 (19 October 2020) paras 9–11). In each case, the question of whether the insolvent has received 'value' for his disposition must be decided by considering all the circumstances in which the transaction was made (*Goode, Durrant and Murray Ltd v Hewitt and Cornell NNO* (*supra*) 291).

For the purposes of s 26 (and also ss 29 and 30), the liabilities of the insolvent include any obligation undertaken as a surety. The insolvent's assets must be taken to include any sum recoverable by way of a right of recourse after payment to the creditor (*Millman & another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (under Curatorship) & others* 1997 (1) SA 113 (C); *Absa Bank Ltd v Scharrighuisen* 2000 (2) SA 998 (C) 1004–5).

If it is proved that the liabilities of the insolvent, at any time after making a gratuitous disposition, exceeded his assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of the excess (s 26(1)). So, for example, if the insolvent made a gift of R5 000 which caused his liabilities to exceed his assets by R10 000, and he acquired assets that reduced

his insolvency margin to R3 000, the disposition may be set aside only to the extent of R3 000.

(ii) Exception to s 26—disposition in terms of ANC

A settlement of property in an antenuptial contract by the husband on his wife or any child to be born of the marriage is not liable to be set aside as a disposition without value on the husband's insolvency if specific requirements are met (s 27(1) and (2)):

- The disposition must be an 'immediate benefit', ie, a benefit given by a transfer, delivery, payment, cession, pledge or special mortgage of property completed within three months of the date of the marriage.
- The disposition must have been given in good faith. 'Good faith' in this context refers to the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above another (s 2).
- The antenuptial contract must have been duly registered at least two years before the sequestration (*Enyati Resources Ltd v Glaum NO & another* 1989 (2) SA 314 (C)).

(iii) Beneficiary's right to share in estate limited

A gratuitous disposition is made without payment or return, ie, made for free. The beneficiary of a gratuitous disposition which has been set aside by the court has no right to claim in competition with the creditors of the insolvent estate (s 26(2)). The same applies to the beneficiary of a gratuitous disposition which has not been set aside but which was uncompleted by the insolvent (*ibid*). But there is one exception to the latter rule: namely, where the uncompleted disposition was made by way of suretyship, guarantee or indemnity. In this event, the promisee may compete with the estate's creditors for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his liabilities immediately before the disposition was made (s 26(2) proviso). So, for example, if the insolvent stood surety (gratuitously) for R5 000 and, immediately before he entered into the contract, his assets exceeded his liabilities by R2 000, then the creditor under the suretyship contract may prove a claim of R2 000 in competition with the insolvent's other creditors. If, immediately before the insolvent contracted, his assets

were less than his liabilities, then the suretyship creditor cannot prove in competition with other creditors. If, before the insolvent contracted, his assets exceeded his liabilities by R6 000, the suretyship creditor in the example may compete to the full extent of his claim of R5 000.

12.2.2 Disposition which prefers one creditor above another: voidable preference

(i) What must be proved

Under s 29(1), the court may set aside a disposition made by the insolvent not more than six months before the sequestration of his estate or his death (where he is deceased and his estate is insolvent) if the disposition had the effect of preferring one of the insolvent's creditors above another and immediately after the disposition was made, the liabilities of the insolvent exceeded the value of his assets. The trustee has the onus of proving all these requirements (*Simon NO & others v Coetzee* [2007] 2 All SA 110 (T) 112). The policy behind s 29 is evidently that a person on the brink of insolvency

Page 172

should not be permitted to choose one or a few of his creditors for full payment and disregard the rest.

The disposition does not have to have been made directly to the creditor concerned—it must have merely had the effect of preferring him (*Standard Finance Corporation of South Africa Ltd (in Liquidation) v Greenstein* 1964 (3) SA 573 (A) 577). So if the insolvent, rather than paying C, his creditor, paid X, a creditor of C, then the trustee can set aside the disposition to X because it had the effect of preferring C above the insolvent's other creditors (*ibid*; see also *Paterson NO v Trust Bank of Africa Ltd* 1979 (4) SA

992 (A)). The test of whether a creditor has been preferred is whether the proper distribution of the assets as envisaged by the Act has been defeated or, in other words, whether the creditor has benefited more or been paid earlier than would have been the case if he had been paid a dividend under the Act (*Isaacson and Son v Van Druten's Trustee* 1930 GWL 33 36; *Klerck NO v Kaye* 1989 (3) SA 669 (C) 675; *Simon NO & others v Coetzee (supra)* 114).

The claims proved against the estate are accepted as *prima facie* proof of the insolvent's liabilities as at the date of sequestration and so may be relevant for establishing the extent of the insolvent's liabilities immediately after the disposition (*Ensor NO v New Mayfair Hotel* 1968 (4) SA 462 (N)). The value of the assets to be assessed is the market value. This has been described as, among other things, the full and fair price which the assets would be likely to realize if sold voluntarily under the usual terms, and the price which a willing seller might reasonably expect to obtain for the assets from a willing buyer (*Venter v Volkskas Ltd* 1973 (3) SA 175 (T) 180).

(ii) Exception to s 29—disposition in the course of business and not intended to prefer

Section 29 enables the trustee to set aside transactions made and assets alienated by the insolvent while close to insolvency. The spectre of the trustee exercising his powers under s 29 could be an insuperable obstacle for a businessperson who wishes to overcome his financial difficulties by carrying on business in the usual way. So the legislature has included a proviso in s 29 that the court cannot set aside a disposition if the person in whose favour it was made proves that it was made in the ordinary course of business and that it was not intended to prefer one creditor above another (s 29(1); *Janse van Rensburg & others NNO v Steenkamp & another*; *Janse van Rensburg &*

others NNO v Myburgh & others 2010 (1) SA 649 (SCA)). The beneficiary must prove both elements if the trustee's claim is to be defeated.

Ordinary course of business

In deciding whether a disposition was made in the ordinary course of business, an objective test is applied—whether the disposition was one which would normally be entered into between solvent businesspersons (*Hendriks NO v Swanepoel* 1962 (4) SA 338 (A) 345; *Amalgamated Banks of South Africa Bpk v De Goede en 'n ander* 1997 (4) SA 66 (SCA) 77–8; *Gazit Properties v Botha & others NNO* 2012 (2) SA 306 (SCA) 309), or, put differently, whether the disposition is in conformity with ordinary business methods adopted by solvent businesspersons (*Van Zyl & others NNO v Turner & another NNO (supra)* 245) or whether it would be anomalous, unbusinesslike or surprising to the ordinary businessperson of business (*Malherbe's Trustee v Dinner & others* 1922 OPD 18 22). In *Griffiths v Janse Van Rensburg & another NNO* 2016 (3)

Page 173

SA 389 (SCA), the court had to deal with the question of whether payments made in terms of an illegal pyramid scheme qualified as payments made in the ordinary course of business. The court reiterated that the test for evaluating whether the dispositions 'were made during the ordinary course of business' is objective (*idem* 394). When the dispositions are assessed, all the relevant facts should be considered, and each case must be evaluated on its own facts. The court held (*ibid*):

'The question is whether ordinary, solvent businesspeople would, in similar circumstances, themselves act as did the parties to the transaction. . . . In other words the disposition in question should not cause wrinkled noses or raised eyebrows among solvent businesspeople who know the circumstances in which it was made.'

The court held that the payments made to the investor in *Griffiths* could not represent dispositions made in the ordinary course of the business because the business operations were clearly illegal and the excessive returns on the investment contributed to such a conclusion (see also *Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA)). In *Al-Kharafi & Sons v Pema & others NNO* 2010 (2) SA 360 (W), Malan J remarked (*idem* 378):

'As was said in *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd* [(1948) 76 CLR 463 (High Court of Australia) 477 *per* Latham CJ], the expression ["in the ordinary course of business"] "does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, so that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special situation".'

The court must have regard to the terms of the disposition and the circumstances in which it was made (including the actions of both parties) but leave out of consideration the fact that the party making the disposition was insolvent then (*Van Zyl & others NNO v Turner & another NNO* (*supra*) 245; *Gore & others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C) 526; *Van der Walt NO & another v Le Roux NO & another* [2004] 4 All SA 476 (O) 485; cf *Al-Kharafi & Sons v Pema & others NNO* (*supra*) 376–7). The court is concerned only with the disposition, not with the insolvent's business generally. A disposition may be made 'in the ordinary course of business' if duly made in terms of a valid contract, even though the insolvent's overall business model is illegal and the payment is made with stolen money (*Gazit Properties v Botha & others NNO* (*supra*) 309–11). In *Moodliar NO & others v Lawson Tool Distributors (Pty) Ltd* 2022 (2) SA 220 (WCC), payments had been made regularly at arm's length on account over four months, the last of them about two months before liquidation. These payments were held to have been made

in the ordinary course of business. Another example of a disposition made in the ordinary course of business is afforded by *Pretorius's Trustee v Van Blommenstein* 1949 (1) SA 267 (O). The insolvent bought a lorry and, some time later, pledged it to secure payment of the price. He concluded the pledge because the seller had sued for the price and was only prepared to give an extension of time for payment if he received real security. The court held that, although it would not generally be in the ordinary course of business for a debtor to give a pledge for a debt which he had incurred earlier, here the insolvent had had little choice and had acted as any ordinary businessperson would have done. Contrast *Paterson NO v Trust Bank of Africa Ltd* (*supra*). In this case, the insolvent, an attorney who had stolen from his trust account and badly needed to raise money, sold his legal practice to his professional assistant, C,

for a cash sum of R15 000 and additional amounts to be paid later. Under the contract, the R15 000 had to be paid into the insolvent's overdrawn business account with T Bank. This provision was inserted at the insistence of T Bank, which was prepared to grant C overdraft facilities for the R15 000 only if the money was applied to reduce the insolvent's overdraft. The court held that, although, *at face value*, the arrangement about how the R15 000 was to be paid was a normal banking transaction, when seen in the light of the circumstances of this case, the arrangement fell outside the ordinary course of business. The contract between the insolvent and C had been in the nature of a forced sale, concluded because the insolvent had misappropriated money from his trust account (which was not an event in the ordinary course of business). And the insolvent had been unable to reject the condition imposed

by the bank, which he would have been able to do if the transaction had been concluded in the ordinary course of business.

If the disposition was concluded in a specialized field of business, such as between brokers on the stock exchange, or between a bookmaker and his client in connection with the laying of bets, the court will consider the customs which are shown to apply in that field of business (*Hendriks NO v Swanepoel (supra)* 345—where it was held that ordinary transactions between farmers are not a special field of business). In *Estate Wege v Strauss* 1932 AD 76 84, the insolvent paid a betting debt which had been outstanding for a long time. The court took cognizance of the custom that betting debts must be paid immediately and held that this payment was not in the ordinary course of business.

To fall within the ordinary course of business, both the making and the receiving of the disposition must be lawful. Where, for example, a creditor receives usurious interest in terms of a contract of loan, the disposition is not in the ordinary course of business (*Klerck NO v Kaye* 1989 (3) SA 669 (C)).

No intention to prefer

The question of what is meant by intention to prefer is discussed below (see 12.2.3). Here it is enough to say that the insolvent will not be held to have intended to prefer if it is established that, when he made the disposition, he did not contemplate or expect sequestration (cf *Pretorius NO v Stock Owners' Co-operative Co Ltd* 1959 (4) SA 462 (A) 472; *Van Eeden's Trustee v Pelunski & Mervis & others* 1922 OPD 144 148), or that his main purpose or dominant motive in making the disposition was something other than the conferring of an advantage on the creditor concerned, eg, to shield himself from criminal prosecution or to cover up a misappropriation of assets and save himself from

exposure (*Pretorius's Trustee v Van Blommenstein (supra)* 279–80) or to comply with a contractual obligation to give possession of his movable property to the creditor concerned for the perfecting of the latter's security under a general notarial covering bond (*Cooper & another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA)). It has been held that proof that the insolvent hoped to tide over his financial difficulties is not in itself sufficient to disprove the intention to prefer (*Swanepoel NO v National Bank of South Africa* 1923 OPD 35 38).

It is not useful to distinguish between the intent to prefer and the underlying reasons or motive (*Moodliar NO & others v Lawson Tool Distributors (Pty) Ltd* 2022 (2) SA 220 (WCC)).

12.2.3 Disposition intended to prefer one creditor: undue preference

(i) What must be proved

Under s 30, the court may set aside a disposition that the insolvent made at any time before sequestration if he made the disposition with the intention of preferring one of his creditors above another and, when he made it, his liabilities exceeded his assets. The trustee has the onus of proving these elements (*Venter v Volkskas Ltd* 1973 (3) SA 175 (T) 177). Once he has done so, judgment must be given in his favour: no defences are available to the person who is benefited by the disposition.

The test for determining whether the insolvent intended to prefer is whether his dominant, operative or effectual intention in making the disposition was to disturb the proper distribution of the assets on insolvency. The test is subjective (*Eliasov NO v Arenel (Pvt) Ltd* 1979 (3) SA 415

(R) 418): the question is not simply whether the insolvent should have known that the disposition would have the effect of conferring a preference but whether, as a fact, he intended the disposition to have this effect, and whether this was his primary objective or main purpose in making the disposition (*Pretorius's Trustee v Van Blommenstein* 1949 (1) SA 267 (O) 279; *Cooper & another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) 1030–1; *Gore & others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C) 530). It stands to reason that the insolvent must have applied his mind to the matter. If he did not actually consider whether he was conferring a preference, he cannot be said to have intended to do so (*Cooper & another NNO v Merchant Trade Finance Ltd (supra)* 1029).

These factors are relevant in determining whether the insolvent's dominant intention was to confer a preference:

- Whether the insolvent contemplated insolvency when making the disposition (*Giddy, Giddy and White's Estate v Du Plessis* 1938 EDL 73 79). Contemplation of insolvency is generally necessary before an intention to prefer can be inferred. Still, it does not follow axiomatically from the fact that the insolvent contemplated sequestration that he had the intention to prefer. Other factors may negate this inference (*Cooper & another NNO v Merchant Trade Finance Ltd (supra)* 1029–30). The court will infer that the insolvent intended to prefer if it is established that he realized, when making the disposition, that sequestration was substantially inevitable (the insolvent in such a case is assumed to have intended the natural consequences of his act: *Du Plessis NO v Oosthuizen en 'n ander* 1999 (2) SA 191 (O) 212–13), unless the evidence negates this inference and shows that his dominant intention was to achieve some purpose other than conferring an advantage on the

creditor in question, eg, to protect himself from criminal prosecution or to avoid exposure (*Pretorius NO v Stock Owners' Co-operative Co Ltd* 1959 (4) SA 462 (A) 472–3; *Venter NO v Barsouth Investments (Pty) Ltd* 1992 (2) SA 78 (C) 84; *Van Zyl & others NNO v Turner & another NNO (supra)* 244; *Cooper & another NNO v Merchant Trade Finance Ltd (supra)* 1030–1; *Gore & others NNO v Shell South Africa (Pty) Ltd (supra)* 530).

- Whether the debtor could exercise a free choice at the time of the disposition. If the debtor paid the creditor under great pressure, for example, to avoid prosecution, an intention to prefer will not be proved. But it is not any pressure or coercion that will displace the intention to prefer, only

Page 176

'pressure which is akin to duress or undue influence, or what has been described in the cases as an "overwhelming sense of imminent peril"; "great pressure"; or even "severe or terrifying pressure"'

(per Griesel J in *Gore & others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C) 530). In *Cooper & another NNO v Merchant Trade Finance Ltd (supra)* 1029, the court accepted that it does not follow, just because the debtor received no consideration for the disposition or was not put under any pressure to make it, that the dominant intention was to prefer the other party. The presence of these factors may conclusively indicate that there was not a dominant intention to prefer, but the converse does not necessarily follow. One must consider all the circumstances and consider what the correct inference to draw is.

- Whether there is any relationship between the insolvent and the creditor (ie, in addition to that of debtor and creditor) (*Cooper & another NNO v*

Merchant Trade Finance Ltd (supra) 1030). A close friendship or family relationship may motivate the insolvent to give a preference. So the presence of either is a factor to be considered in deciding whether there was an intention to prefer, but it is not conclusive of the issue (*Pretorius's Trustee v Van Blommenstein (supra)* 279–80; *Pretorius NO v Stock Owners' Co-operative Co Ltd (supra)* 474–5).

In deciding whether the insolvent intended to prefer, the court must weigh up all the relevant facts that prevailed at the time of the disposition and decide the issue on a balance of probabilities. If the facts allow more than one inference, the court must choose the most plausible or probable inference. If this inference favours the trustee, he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the trustee will not have discharged the onus resting on him (*Cooper & another NNO v Merchant Trade Finance Ltd (supra)* 1027–8). The fact that the insolvent does not give evidence does not *ipso facto* (by that very fact) mean that one must infer that there was an intention to prefer (*ibid* 1028).

(ii) Differences between trustee's powers under s 30 and s 29

It will be observed that the trustee's powers under s 30 (undue preference) differ significantly from his powers in terms of s 29 (voidable preference):

- An undue preference may be set aside irrespective of when before sequestration it was made. By contrast, a voidable preference can only be set aside if it was made not more than six months before sequestration or the insolvent's death (as the case may be).
- For a disposition to be an undue preference, the debtor must actually be insolvent when he makes it. A disposition may qualify as a voidable preference even

if the debtor is solvent when he makes it, provided he is insolvent immediately afterwards.

- To have a disposition set aside as an undue preference, the trustee must prove that the debtor actually intended to prefer one creditor above the others. On the other hand, the trustee may establish a voidable preference by showing merely that the disposition had the effect of preferring one creditor above another.
- Section 30 does not grant a defence to the beneficiary of an undue preference, while s 29 does grant a defence to the beneficiary of a voidable preference.

Page 177

12.2.4 Collusive disposition which prejudices creditors or prefers one creditor

Under s 31(1), the court may set aside a transaction entered into by the debtor before sequestration in terms of which he, in collusion with another person, disposed of his property in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another. The element of collusion distinguishes this type of disposition from voidable and undue preferences. Collusion in this context is an agreement with a fraudulent purpose, not merely an agreement with the result that one creditor is preferred over another (*Meyer NO v Transvaalse Lewendehawe Koöperasie Bpk en andere* 1982 (4) SA 746 (A) 771). In *M & another v Murray NO & others* 2020 (6) SA 55 (SCA), the debtor sought to keep his pension money away from his creditors. The court found that his divorce from his wife was a sham, and their settlement agreement under which she received nearly all his assets and money (including the pension money) constituted collusion.

To succeed with an action under s 31(1), the trustee must prove these requirements:

- The insolvent made a disposition of his property (*Louw NO v DMA Fishing Enterprises (Pty) Ltd & another* 2002 (2) SA 163 (SE) 165—the reference in this case to 's 36' is clearly a mistake);
- The disposition was made 'in collusion with another person': that is to say, the insolvent and the other person both knew that the former was insolvent and expected the disposition to have the effect of prejudicing creditors or preferring one above another (*Gert de Jager (Edms) Bpk v Jones NO en McHardy NO* 1964 (3) SA 325 (A) 331; *Meyer NO v Transvaalse Lewendehawe Koöperasie Bpk en andere (supra)* 771).
- The disposition had the effect of prejudicing creditors or preferring one creditor above another (*Lane NO & another v Harksen & others* [1998] 4 All SA 7 (C) 15).

Besides setting aside the collusive disposition, the trustee may recover from any person who was a party to the disposition

- any loss which the disposition caused to the insolvent estate; and
- a penalty in an amount determined by the court, but not exceeding the amount by which the party concerned would have been benefited by the disposition if it had not been set aside (s 31(2)).

The compensation and penalty may be recovered in the action to set aside the disposition (s 31(3)). If the other party to a collusive disposition is a creditor, he forfeits any claim that he may have had against the estate (s 31(2); *Gert de Jager (Edms) Bpk v Jones NO en McHardy NO (supra)* 337).

12.2.5 Disposition in fraud of creditors (*actio Pauliana*)

Although the Act sets out specific circumstances in which a disposition of the insolvent's property may be set aside, it does not deprive creditors of their right under the common law to have a disposition set aside as being *in fraudem creditorum* (in fraud of creditors) (*Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A) 938; Peterson & another NNO v Claassen & others 2006 (5) SA 191 (C) 202*). The relevant action at common law derives from Roman law and is known as the *actio Pauliana* (*Fenhalls v Ebrahim & others 1956 (4) SA 723 (D); Nedcor Bank Ltd v Absa Bank & another 1995 (4) SA 727 (W) 729–30*). The *actio Pauliana* grants a creditor in an insolvent estate a common-law

Page 178

remedy to recover assets that ought to have been in an insolvent estate and it is still available to creditors even after the debtor is liquidated (*Ameropa Commodities (Pty) Limited v Benchimol NO 2020 JDR 1223 (KZD) para 24*).

To succeed in bringing the *actio Pauliana*, the plaintiff must prove that:

- the transaction diminished the debtor's assets;
- the person who received from the debtor did not receive his own property;
- there was an intention to defraud; and
- the fraud took effect

(see *Hockey NO v Rixom NO & Smith 1939 SR 107 118; Fenhalls v Ebrahim & others (supra) 727*).

The term 'fraud' in this context does not have its criminal-law connotation: the test is simply whether the object of the transaction was to give one creditor an unfair advantage over the other creditors in insolvency (*Trustees*

Estate Chin v National Bank of South Africa Ltd 1915 AD 353 363; *Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA) 916; *Al-Kharafi & Sons v Pema & others NNO* 2010 (2) SA 360 (W) 371). In the case of a disposition for value (ie, one made *ex titulo oneroso*), it must be shown both that the insolvent intended to commit a fraud on his creditors and that the recipient of the disposition knew of his intention and was privy to it (*Hockey NO v Rixom and Smith (supra)* 119; *Pharmaceutical Enterprises (Pty) Ltd & others v Main Road Centurion 30201 CC t/a Albermarle Pharmacy & another* 2021 (5) SA 246 (GJ) 251). On the other hand, in the case of a gratuitous disposition (ie, one made *ex titulo lucrativo*), it is enough to prove fraud on the part of the insolvent alone: the good faith or otherwise of the recipient is irrelevant (*Hockey NO v Rixom and Smith (supra)* 119; *Scharff's Trustee v Scharff* 1915 TPD 463; cf *Kommissaris van Binnelandse Inkomste en 'n ander v Willers en andere* 1999 (3) SA 19 (SCA) 28–9).

'Voet [42.8.15] gives a large number of illustrations of such fraudulent transactions, such [as] granting a long lease of property at a very low rental, allowing a claim against a debtor to become prescribed, failing to defend a groundless action, selling, giving or pledging one's property for another's debt or constituting oneself a debtor to a person to whom in fact nothing is owing' (*Bertelsmann et al Mars: The Law of Insolvency in South Africa* para 13.8).

Creditors may invoke the *actio Pauliana* to recover the assets disposed of and any benefits accruing from the insolvent's fraud. The latter benefits include the proceeds of trading with the alienated assets as well as any property acquired with it (or its value or the proceeds of it) (*Kerbyn 178 (Pty) Ltd v Van den Heever & others NNO* 2000 (4) SA 804 (W) 818–20).

12.3 Proceedings to set aside voidable disposition

12.3.1 Who may sue

Proceedings to set aside a disposition rendered impeachable by the Act, or to recover compensation or a penalty payable under the Act, may be instituted by the trustee (s 32(1)(a)). If the trustee fails to bring the proceedings, a creditor may sue in the trustee's name, provided the creditor indemnifies the trustee against all costs (s 32(1)(b); cf *Myburgh v Walters NO* 2001 (2) SA 127 (C) 130). The indemnity is necessary to

Page 179

protect the estate against any adverse costs order that the creditor may incur, the trustee being liable, as nominal plaintiff, for such costs. So the indemnity must be given before the action is instituted and must be adequate for the purpose of the proceedings. In addition, the creditor must be able to meet his obligations under the indemnity within a reasonable time after being called upon to do so by the trustee (*Lane & another NNO v Dabelstein & others (Lane & another NNO intervening)* 1999 (3) SA 150 (C) 163–6; *Western Flyer Manufacturing (Pty) Ltd v Dewrance & others NNO: In re Dewrance & others NNO v North West Transport Investments (Pty) Ltd (under Judicial Management) & others* 2007 (6) SA 459 (B) 465 470). In *Lane's* case, the court accepted that a creditor may sue to avoid a disposition where only a provisional trustee has been appointed and that trustee has failed to obtain leave from the court to sue under s 18(3). The court held (differing from an earlier decision in *Lane NO & another v Harksen & others* [1998] 4 All SA 7 (C)) that the creditor need not obtain leave of the court, since he must provide an indemnity under s 32(1) and this protects creditors of the estate (cf *Dabelstein & others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) 1229). In the *Western Flyer* case, the court

explained (*idem* 470) that although the institution of proceedings without first providing an indemnity constitutes an irregularity, it does not necessarily invalidate the proceedings.

'The purpose of the Legislature as expressed in s 32 of the Act . . . is to provide that in the event of a creditor instituting action in the name of the trustee, the trustee should be safeguarded by the indemnity against all costs of the litigation. The purpose of the section is not to regulate principles relating to *locus standi* or the validity of the manner by which the action is to be instituted. For that reason the indemnity must be provided before the action is instituted (ie before any costs have been incurred.) However, if it is provided after the action has been instituted in such a manner that the trustee is not at risk as far as costs (both before and after the indemnity) are concerned, the purpose of s 32 has been achieved.'

In *Cowan v Hathorn NO* 2013 JDR 2671 (SCA), the indemnity for costs was only furnished after proceedings were instituted. The court held that the indemnity must be furnished to ensure that the liquidators are not liable for an adverse costs order that the creditors may incur while litigating in the liquidators' name when the liquidators no longer control the proceedings or the expenditure involved. The section aims at preventing the dissipation of the company assets. In the circumstances, the indemnity had been offered before the proceedings were instituted, and the liquidators were adequately protected and never at risk.

When a creditor institutes an action in the trustee's name, he must cite the trustee as the plaintiff (ie, nominal plaintiff) in the proceedings. It is not competent for the creditor to sue in his own name and merely allege that he sues in the name of the trustee (*Volkskas Bpk NO v Barclays Bank (DC & O)* 1955 (3) SA 104 (T)). No other creditor may derive any benefit from moneys or property recovered in the action until the claim and costs of the litigating creditor have been paid in full (s 104(3)). And any creditor who knew that the proceedings had been instituted and who delayed in proving his claim until the court had given judgment cannot share in any money or in the

proceeds of any property recovered as a result of the proceedings (s 104(2)).

The trustee is also the proper person to institute the *actio Pauliana* at common law (*Wolpe v Gale* 1980 (3) SA 259 (W)). The court may, on application, allow a creditor to sue in his own name, provided he joins the trustee as a party to the suit,

either as a co-plaintiff (if the trustee is willing) or as a co-defendant (if he is unwilling).

12.3.2 Jurisdiction of court

Proceedings to set aside an impeachable disposition may be brought in the magistrate's court, provided the matter falls within the normal jurisdictional limits of that court (s 2 sv 'court').

12.3.3 Time for bringing proceedings

The trustee's power to bring proceedings to set aside improper transactions under s 32(1) is not subject to any time constraints. The trustee (or, failing him, a creditor) may institute proceedings even after confirmation of the liquidation and distribution account. Confirmation of an account under s 112, in other words, has no bearing on a claim under s 32 (*Cook NO v SJ Coetzee Inc* 2012 (2) SA 616 (GNP) 622).

12.3.4 Interim relief

If the subject matter of an impeachable disposition is in the creditor's possession, the trustee may apply to court for an attachment of the property concerned, pending the determination of proceedings to set aside the disposition (*Hawkins' Trustee v Corio Saw and Planing Mills Ltd &*

others 1923 WLD 125). The trustee need only make out a *prima facie* case that he may reclaim the property for the estate: he need not show that the estate will suffer irreparable loss if the attachment is not granted (*ibid*; see also 11.1).

The requirement of suing in the trustee's name does not necessarily apply to interim proceedings. A creditor may institute these in his own name if the situation requires swift action to protect a right, especially one that is vindicatory or quasi-vindicatory (*Ultrapolymers (Pty) Ltd v Maredi NO & another* 2012 (4) SA 232 (GSJ) 234–5).

12.3.5 Evidence

Under s 32(2), any party to proceedings to set aside an improper disposition may subpoena the insolvent to give evidence, and the court may also call upon him to do so. The section then states that, when giving evidence, the insolvent may not decline to answer a question on the ground that the answer may tend to incriminate him or may prejudice him in criminal proceedings which are to be brought against him. In the light of *Parbhoo & others v Getz NO & another* 1997 (4) SA 1095 (CC), it seems clear that this latter provision infringes the constitutional right against self-incrimination (s 35 of the Constitution of the Republic of South Africa, 1996) and is invalid in so far as it permits the use of incriminating evidence in criminal proceedings (except proceedings dealing with perjury or related offences). In *Parbhoo*, the Constitutional Court declared invalid s 415(5) of the Companies Act 61 of 1973 (dealing with the admissibility of evidence obtained at an inquiry under s 415(1) of the Act) to the extent that the section provided for the admission of incriminating evidence in criminal proceedings, other than for perjury or related offences (see also 23.9.1).

When a creditor has instituted proceedings in the trustee's name, the creditor may not make discovery under the Uniform Rules of Court: only the trustee can do so (*Reynolds & others NNO v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W) 662–3).

12.3.6 Prescription of claim

In *Barnard and Lynn NNO v Schoeman & another* 2000 (3) SA 168 (N) 171–2, the court held that a claim to set aside an impeachable disposition (in *Barnard's* case, a voidable preference) does not become a debt for the purposes of prescription. So prescription in respect of the claim does not begin to run until the court has determined the value of the claim and pronounced upon it, after considering any possible defences available to the debtor. This view was rejected in *Duet and Magnum Financial Services CC (in Liquidation) v Koster* 2010 (4) SA 499 (SCA) 505–8. The court accepted that ss 26 to 31 and s 32(3) of the Insolvency Act give the trustee (or liquidator) a right, in prescribed circumstances, to have a person declared a debtor of the estate, and the complement of this right qualifies as a 'debt' for the purposes of prescription. The court also held that prescription of the debt ordinarily begins to run no later than the date on which the trustee (or liquidator) is appointed.

12.4 Order setting aside disposition

12.4.1 Recovery of any property alienated

When setting aside a disposition, the court must declare the trustee entitled to recover any property alienated under the disposition (s 32(3)). It may be impossible for the third party to return the property—for instance, because it has

been destroyed or transferred to another person. In that event, the court must declare the trustee entitled to recover the value of the property, ie, the value at the date of the disposition, or at the date on which the disposition is set aside, whichever is the higher value (*ibid*).

12.4.2 Execution on court's judgment

Once judgment is granted in favour of the trustee, he is in the same position as any other judgment creditor and may have recourse to the ordinary methods and processes of execution, should the defendant not obey the order of his own accord (*De Hart NO v Kleynhans & others* 1970 (4) SA 383 (O) 389). *Mora* interest is payable by the defendant from the date of the judgment setting aside the disposition (*Janse van Rensburg & others NNO v Steyn* 2012 (3) SA 72 (SCA) 80–1). (*Mora* interest is interest payable because of wrongful delay in performing an obligation.) If the defendant's estate is under sequestration, the trustee is not entitled to obtain payment of the full amount of the judgment debt but is merely entitled to prove as a concurrent creditor in the estate (*ibid*). In *Pride Milling Co (Pty) Ltd v Bekker NO & another* 2022 (2) SA 410 (SCA), the appeal concerned the application of s 341(2) of the Companies Act 61 of 1973. That provision reads: 'Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.' The general rule was that such a disposition was void and of no effect, but the court might still, as an exception, order otherwise in appropriate circumstances. In this regard, the court exercised an unfettered discretion and must decide what would be just and fair in the light of all the relevant circumstances. The factors that the court would consider included the underlying purpose of s 341(2) of the

Companies Act in the context of a company being wound up for its inability to pay its debts (in other words, to prevent this company from dissipating its assets and thus frustrating its creditors' claims), the interests of creditors, and the

interests of the beneficiary of the disposition. But the court's discretion was limited to payments made between the date of the lodging of the application for winding-up and the date of the granting of the provisional order, the latter being the point at which the *concursum creditorum* (concourse of creditors) was reached (*idem* 422).

12.4.3 Indemnity to *bona fide* recipient of disposition

Under s 33(1), the recipient of a voidable disposition who in good faith parted with property or security or lost a right against another person need not comply with an order to restore the subject matter of the disposition, unless the trustee has indemnified him for parting with the property or security or for losing the right. The recipient must prove, in particular, the following requirements (the onus being on him to do so: *Ruskin NO v Barclays Bank DCO* 1959 (1) SA 577 (W)):

- *That, in return for the disposition, he parted with property or security which he held, or lost a right against another person.* The words 'in return for' indicate that there must be reciprocity between the disposition and the passing of the property or the loss of the right. In other words, the latter must be the *quid pro quo* for the former (*Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in Liquidation) & another* 1985 (4) SA 407 (D)). Section 33(1) does not apply if the recipient has

neither parted with property nor given up any right in return for the disposition (*Geyser NO & another v Telkom SA Ltd* 2004 (3) SA 535 (T) 548) or if there is merely an incidental connection between them (*Consolidated News Agencies (Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd & another* 2010 (3) SA 382 (SCA) 398). In the *Barclays Bank* case, the insolvent (a company) had given a suretyship undertaking to B Bank and passed a bond in favour of the bank to secure payment in terms of the suretyship undertaking. The bank argued that, in return for these dispositions, it had parted with sums of money (namely, amounts lent to the principal debtor on overdraft after the signature of the deed of suretyship) and that it was not obliged to restore the benefit which it had obtained under the dispositions unless the liquidator indemnified it for the loans in question, which the liquidator had not done. The court held that the loans were not the consideration or the *quid pro quo* for the suretyship undertaking and bond. The loans had been given under an agreement between the bank and the principal debtor. If they had been made in return for anything, it was the undertaking by the principal debtor to pay interest on the overdraft. It followed that the bank's contention could not be sustained. In the *Consolidated News Agencies* case (*idem* 398–9), the court observed that where the respective acts of the parties are said to have arisen from an agreement between them, an examination of the terms of the agreement is the first step in determining whether the necessary reciprocity is established.

- *That he acted in good faith.* The requirement of good faith applies to all the circumstances surrounding the transaction; it is not confined to the conduct that gave rise to the property or security being parted with or

the right being lost (*Ruskin NO v Barclays Bank DCO (supra)* 584–5; *Geyser NO & another v Telkom SA Ltd (supra)* 549; *Consolidated News Agencies (Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd & another (supra)* 400–1). The creditor must show, among other things, that at the time of the transaction (when he parted with the property or gave up the right), he did not know or contemplate that the debtor was insolvent or on the brink of insolvency (cf *Ruskin NO v Barclays Bank DCO (supra)* 584; *Consolidated*

News Agencies (Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd & another (supra) 400–1).

The underlying purpose of s 33(1) is to ensure that, when a disposition is set aside in terms of the Act, there is *restitutio in integrum*, ie, the restoration of *both* parties to their positions before the disposition was made (*Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in Liquidation) & another (supra)* 411). Proof of the requirements stated above does not affect the right of the trustee to have the disposition set aside. Still, the trustee cannot insist on compliance with the court's order for the return of the property or benefit disposed of until he has given an indemnity to the recipient (*Ruskin NO v Barclays Bank DCO (supra)* 583).

12.4.4 Effect of order on underlying debt

It is not entirely clear whether an order setting aside a disposition always extinguishes the debt between the parties. The issue is important, not only for the beneficiary of the disposition, who may wish to claim against the

insolvent estate, but also for a surety for the debtor, since a surety is discharged if the principal obligation is extinguished for any reason.

The courts appear to have accepted that an order setting aside a gratuitous disposition under s 26 invalidates the debt between the parties and so precludes any claim by the beneficiary and discharges any surety (see, eg, *Linden Duplex (Pty) Ltd v Harrowsmith* 1978 (1) SA 371 (W); cf also s 26(2) and 12.2.1(ii)). But there are conflicting decisions on whether an order setting aside a voidable preference under s 29 has the same effect. In *Freedman and Rossi (Pty) Ltd v Geustyn & others* 1986 (4) SA 762 (W), it was held that the order vitiates the debt, but in *Millman NO and Stein NO v Kamfer; Millman NO and Stein NO v Engelbrecht* 1993 (1) SA 305 (C), the court held that the order merely prohibits the unusual, prejudicial performance of the debt and does not extinguish the debt. According to this view, the beneficiary may claim against the estate, and a surety for the insolvent remains liable.

The courts have not yet spelt out the consequences of an order setting aside a disposition under s 30 (undue preference) or a disposition under s 31 (collusive disposition). For the beneficiary of the collusive disposition, though, the issue is of academic interest, since s 31(2) provides that if the other party to a collusive disposition is a creditor, he forfeits any claim that he may have had against the estate (see also *Gert de Jager (Edms) Bpk v Jones NO en McHardy NO* 1964 (3) SA 325 (A) 337).

It remains to be seen which approach will find favour with the Supreme Court of Appeal. Clearly, the same principle should apply whether or not the disposition before the court is set aside in terms of s 26 or s 29 or, for that matter, any other section.

12.5 Exemption of certain dispositions from Act

In some instances, the provisions of the Act governing dispositions do not apply:

- Sections 26, 29 and 30 (dispositions without value, voidable preferences and undue preferences) do not apply to property disposed of under the exchange rules, depository rules or clearing house rules (s 35A(5)), or property disposed of in terms of a master agreement (s 35B(4)). See also 7.2.9–10.
- Under s 35(2)(a) of the Prevention of Organised Crime Act 121 of 1998, if the estate of a defendant who has made an affected gift to another person is sequestrated, a

Page 184

court must not set aside the disposition of that gift under ss 29, 30 or 31 of the Insolvency Act if a prosecution for an offence has been instituted against the defendant and the proceedings against him or her have not been concluded, or if that other person's property is subject to a restraint order. If a court does set aside a disposition contemplated under s 35(2)(a) after proceedings against the defendant have been concluded, the court must take into account any realization of the property of the other person under Chapter 5 of the Act (s 35(2)(b)). (Chapter 5 of the Prevention of Organised Crime Act deals with the proceeds of unlawful activities.)

12.6 Transfer of business without prescribed notice

Under s 34(1) of the Insolvency Act, if a trader, without giving notice as prescribed by the Act, transfers in terms of a contract a business belonging to him, or its goodwill, or any goods or property forming part of it (except in the ordinary course of that business or for securing the payment of a debt), the transfer is void as against his creditors for six months from then onwards, and it is void against his trustee if his estate is sequestrated at any time within that period. 'Transfer' for these purposes includes the transfer of possession, actual or constructive: the trader does not actually have to transfer ownership to the other party (s 34(4)). Section 34(1) applies irrespective of how the transfer takes place or the nature of the preceding agreement (*Roos NO en 'n ander v Kevin and Lasia Property Investments BK en andere* 2002 (6) SA 409 (T) 415). The notice referred to is the publication of a notice of intended transfer in the *Government Gazette* and two issues of an Afrikaans newspaper and two issues of an English newspaper circulating in the district in which that business is carried on (s 34(1)). The publication must appear not less than 30 days and not more than 60 days before the date of the transfer (*ibid*). It must provide accurate information about the transfer—if, for example, it states the wrong date, it is invalid (*Simon v DCU Holdings (Pty) Ltd & others* 2000 (3) SA 202 (T) 226). Publication of the notice is required even if the trader's creditors know about the intended transfer (*Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others* 2012 (3) SA 35 (SCA) 42).

As soon as a notice is published under s 34(1), every liquidated liability of the trader in connection with his business which would become due at some future date falls due immediately if the creditor concerned demands payment (s 34(2)).

The following should be noted about the scope and effect of s 34(1):

- The section is designed to protect the creditors of a business. It is aimed at the (all too common) practice by which a trader seeks to evade his business debts by disposing of the business to a third party who is not liable for its debts and, from then onwards, dissipating the price or using it to pay some creditors, regardless of the claims of others (*Harrismith Board of Executors v Odendaal* 1923 AD 530 538; *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others* (*supra*) 43–4). The section applies whether or not the trader's estate is sequestrated (*Vermaak v Joubert and May* 1990 (3) SA 866 (A) 873) and even if the disposal was an advantageous one—for example, at a price exceeding the value of the assets in question—because creditors may be prejudiced even when the business or its assets are disposed of advantageously (*Joosab v Ensor NO* 1966 (1) SA 319 (A) 326–7).
- The section applies only to traders. A 'trader', under s 2, is a person who carries on a trade, business, industry or undertaking of a kind specified in the section (see 4.2).

The specified activities cover a wide field and include any business in which property is sold or is bought, exchanged or manufactured for sale or exchange. Certain activities are not covered—for example, letting and hiring of immovable property (*Kevin and Lasia Property Investment CC & another v Roos NO & others* 2004 (4) SA 103 (SCA) 108) and transport haulage (*McCarthy Ltd v Gore NO* 2007 (6) SA 366 (SCA) 370). The test in each case is whether the person concerned carries on the relevant activity as part of his core business (*McCarthy Ltd v Gore NO* (*supra*)).

370–1; *K2013046547/07 (South Africa) (Pty) Ltd v Hyde Construction CC* 2021 JDR 1210 (SCA) para 13), bearing in mind also that the core business can change (*K2013046547/07 (South Africa) (Pty) Ltd v Hyde Construction CC (supra)* para 23). The definition does not apply if the activity is merely incidental to the primary business activities of the enterprise (*McCarthy Ltd v Gore NO (supra)* 370–1). The definition says that a person is deemed to be a trader until proved otherwise. So a person alleged to be a trader bears the onus of proving that his primary business activity falls outside the ambit of the definition (*Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others (supra)* 44; *K2013046547/07 (South Africa) (Pty) Ltd v Hyde Construction CC (supra)* para 11). The date on which it must be determined whether the debtor was a trader is the date of transfer of the property (*K2013046547/07 (South Africa) (Pty) Ltd ibid*; *Axal Properties 2 CC v Kotze* 2013 JDR 2086 (SCA) paras 2.1 and 3). A person does not stop being a trader for these purposes simply because he stops operating his business ('closes his doors') (*Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA) 35). He remains a trader and remains subject to s 34(1) for as long as he owns the business or its assets and owes debts in respect thereof. So, for example, the section applies when a trader alienates the assets of his business four weeks after he has stopped trading (*Bank of Lisbon International Ltd v Western Province Cellars Ltd & another* 1998 (3) SA 899 (W) 901). Further, it is irrelevant what caused the trading to stop. The trader's voluntarily stopping trading because of financial difficulties must not be distinguished from his being compelled to stop by the financial collapse of the business. In both cases the trader's creditors need

to be protected by s 34 (*Axal Properties 2 CC v Kotze (supra)* para 9).

- The section applies to the transfer of part of a business, in particular, the transfer of the goodwill of the business, or goods or property forming part of the business. In *Joosab v Ensor NO (supra)*, it was held that, having regard to the purpose of s 34(1), it would be undesirable to lay down any definite criterion for determining when goods form part of a business (see also *Kelvin Park Properties CC v Paterson NO (supra)* 36). But any goods bought and received by a trader ostensibly for his business must be considered to form part of the business, irrespective of whether the goods have been physically appropriated to its stock in trade. In the court's view, if the position were otherwise, the purpose of the section could easily be defeated.
- The section does not apply to the transfer of goods or property of a business if the transfer is 'in the ordinary course of that business'. The word 'that' is important: the inquiry is not whether the transaction would have normally been entered into by solvent businesspersons (cf 12.2.2(ii)), but whether it would have normally been concluded by a solvent businessperson conducting a business of the kind carried on by the debtor (*Joosab v Ensor NO (supra)* 326; *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others (supra)* 42–3). Regard must be had to what

is, or would be, done by similar businesses in similar circumstances (*Ensor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) 825). In this case, M, which carried on business as, among other things, a dealer in Mazda vehicles and spare parts under a franchise

from I, sold its entire stock of Mazda parts to I. The sale came about because I had terminated the franchise agreement between the parties and had exercised an option in the agreement which allowed it, on the termination of the franchise, to buy all unsold Mazda parts held by M. The court held that, although the sale by a motor dealer of his stock of spare parts at one and the same time would not normally be in the ordinary course of that business, in this particular case the position was different because M had been obliged to sell in terms of the franchise agreement. This agreement had been entered into in the ordinary course of M's business, and its terms had been an integral part of the business. In submitting to I's exercise of its rights under the agreement, M had acted as any solvent businessperson carrying on that type of business would have done. Trollip JA observed (*idem* 826):

'[I]t must necessarily be a paramount principle of carrying on business that a solvent trader should duly honour his obligations under a contract entered into in the ordinary course of his business.'

Contrast *Gore & another NNO v Saficon Industrial (Pty) Ltd* 1994 (4) SA 536 (W), *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others (supra)*, and *Roos NO en 'n ander v Kevin and Lasia Property Investments BK en andere* 2002 (6) SA 409 (T). In *Gore's* case, S, a company in the business of selling and servicing forklifts, sold 90 per cent of its assets in the hope of staving off liquidation of the group of companies of which it formed part. It was held that just because the sale fell within the ordinary course of business of the group of companies as a whole (as was alleged), it did not mean that the sale was within the ordinary course of S's business. S was in the business of providing forklifts, and the sale did not fit into the ordinary course of that business.

Similarly, in *Gainsford's* case, a company used its immovable and movable property to run a ski resort business. The court held that the company's disposal of all this property could 'by no stretch of the imagination' fall within the ordinary scope of its business (*idem* 42 44).

In *Roos*, a company earning income from letting shops and flats on its immovable property had two creditors. One of them was a bank holding three mortgage bonds over the immovable property. To discharge its indebtedness to the bank, the company sold its entire business, including the immovable property, subject to the condition that the buyer must register a bond in favour of the bank in the same amount as the company's debt to the bank.

Transferring the property left the company an empty shell, unable to pay its other creditor. The court held that, as the transfer had effectively rendered the company incapable of carrying on its business of generating income through property letting, it had not been concluded in the ordinary course of the company's business.

- The section is also inapplicable when the transfer is to secure the payment of a debt. So, for example, the section does not apply to the pledge of a movable.
- When the trustee alleges that a transfer of goods falls within the section, he bears the onus of proving that

- the goods formed part of the insolvent's business at the time of the transfer (*Silverstream Investments (Kranskop) CC v Ronbo Automotive CC* 1997 (1) SA 107 (D) 111)—it is not enough for him to show, for example, that they form part of the insolvent's assets generally (*Bruyns*

NO v Aerogrande (Pty) Ltd 1964 (3) SA 554 (W)); and

- the transfer was not in the ordinary course of the insolvent's business (*Ensor NO v Rensco Motors (Pty) Ltd (supra)* 822; *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others (supra)* 44).
- A transfer which has not been advertised is void as against the trustee. It follows that the trustee need not bring an action to have the transfer set aside: he may simply disregard it and demand the return of whatever assets have been delivered to the transferee (*Harrismith Board of Executors v Odendaal (supra)* 538–9). But if the transferee resists, the trustee will, in effect, be compelled to ask the court for an order declaring the transfer void and requiring the transferee to hand over all the assets in his possession which originally belonged to the business (*Scott-Hayward NO v Lief NO* 1958 (3) SA 65 (T); *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A) 743). If the transferee has already resold the assets and can no longer restore them to the trustee, the latter may sue for their value by bringing a delictual action for wrongful disposal (*actio ad exhibendum*) (*Gore & another NNO v Saficon Industrial (Pty) Ltd (supra)*). Once the transferee has returned the assets (or their value) to the trustee, he has a concurrent claim against the estate for the amount that he paid or for the other performance that he rendered to the insolvent.
- An unadvertised transfer is not void in any absolute sense but only against the trustee. This means that it is within the trustee's discretion to treat the transfer as void. The trustee may always waive or choose not to exercise his powers under the section, and if he does this, the transfer remains standing (*Galaxie*

Melodies (Pty) Ltd v Dally NO (supra) 743; *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others (supra)* 45). Usually, the trustee will choose to abide by the transfer if the assets have depreciated since the conclusion of the sale and he will find it difficult to match the price agreed upon, or if the price fixed still exceeds the market value of the assets. A decision by the trustee to treat the transfer as void invalidates any mortgage bond that the transferee has registered over the immovable property of the business (*Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others (supra)* 45–9). The reason is that a transfer in contravention of s 34 is void *ab initio* (from the beginning), so the transferee does not acquire the ownership of the immovable property and cannot encumber this property with a mortgage bond. The mortgagee is not arbitrarily deprived of property as envisaged by s 25(1) of the Constitution, among other things, because there is a rational connection between the voidness of a transfer hit by s 34(1) and the ends sought to be achieved (to protect the creditors of a trader who transfers his business at a time when he is in financial difficulties) (*ibid*).

- The transfer is also void against the creditors, in the relative sense, enabling them to treat the transfer as void for the purpose of recovering payment of their debts (*Pharmaceutical Enterprises (Pty) Ltd & others v Main Road Centurion 30201 CC t/a Albermarle Pharmacy & another* 2021 (5) SA 246 (GJ) 250).

12.7 Transfer of business after proceedings instituted

Section 34(3) deals with the situation in which a trader transfers his business after another person has instituted proceedings against him for the purposes of enforcing a claim against him in connection with the business. The section renders the transfer void as against the person concerned for the purpose of such enforcement if either

- the transferee is aware, at the time of transfer, that the proceedings have been instituted; or
- the proceedings have been instituted in a High Court or magistrate's court that has jurisdiction in the district in which the business is carried on.

The following should be noted about s 34(3):

- Section 34(3) applies irrespective of whether the trader gives notice of the transfer of the business as prescribed by s 34(1) (*Simon v DCU Holdings (Pty) Ltd & others* 2000 (3) SA 202 (T) 222).
- The creditor is protected if he has instituted proceedings before the transfer—he need not have taken judgment (*Weltmans Custom Office Furniture (Pty) Ltd (in Liquidation) v Whistlers CC* 1999 (3) SA 1116 (SCA) 1121).
- The protection provided by s 34(3) is not limited as to time (*Soomar v Avon Leigh CC t/a Elsea Products* 2000 (1) SA 524 (E) 528–9).
- For s 34(3) to apply, the claim sought to be enforced must be one 'in connection with the business'—a claim to enforce a liability of the trader unrelated to the business does not enjoy the protection of the section. In *Simon v DCU Holdings (Pty) Ltd & others (supra)*, it was held that the phrase 'in connection with the business' must not be interpreted in a narrow or technical way and that it is wide enough to include a claim for the balance of the price of all the assets of the business.

To determine whether a creditor's claim arises in connection with the business, the nature of that business and of the creditor's claim must be determined (*Axal Properties 2 CC v Kotze* 2013 JDR 2086 (SCA) para 18). A claim not arising in connection with the trader's primary or core business is rejected (*idem* para 21).

- The creditor is not denied the protection of s 34(3) where the agreement on which his claim is based has been amended or superseded by another agreement, provided there is a sufficiently close connection between the proceedings and the second agreement. In *Weltmans Custom Office Furniture (Pty) Ltd (in Liquidation) v Whistlers CC (supra)*, the agreement of sale originally sued upon had been replaced by a settlement agreement. This agreement was held to be sufficiently closely connected to the proceedings for s 34(3) to apply. Melunsky AJA explained (*idem* 1122):

'[T]he compromise did not change the essential nature of the [creditor's] claim Both the original and the settlement agreements related to the sale of the same business and the [creditor's] claim, under each agreement, was for payment of the purchase price. The compromise differed from the original agreement in relation to the amount payable and the method of payment but it did not alter the essence of the [creditor's] claim or the debtor's obligation The result is that the proceedings instituted by the [creditor] before the transfer are sufficiently closely connected to its claim under the settlement agreement to entitle this Court to hold the transfer to be void for the purposes of s 34(3).'

- Section 34(3) does not render the transfer of the business completely void, but only void as against the creditor who has instituted proceedings and to the extent of his claim (*Weltmans Custom Office Furniture*

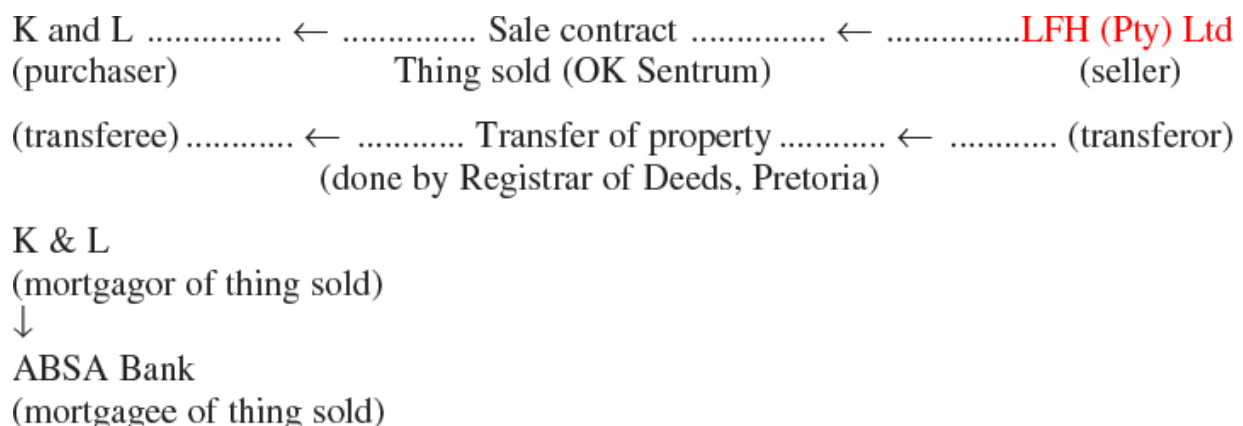
(Pty) Ltd (*in Liquidation*) v Whistlers CC (*supra*) 1123).

12.8 Suggestions for visual learners using diagrams and timelines

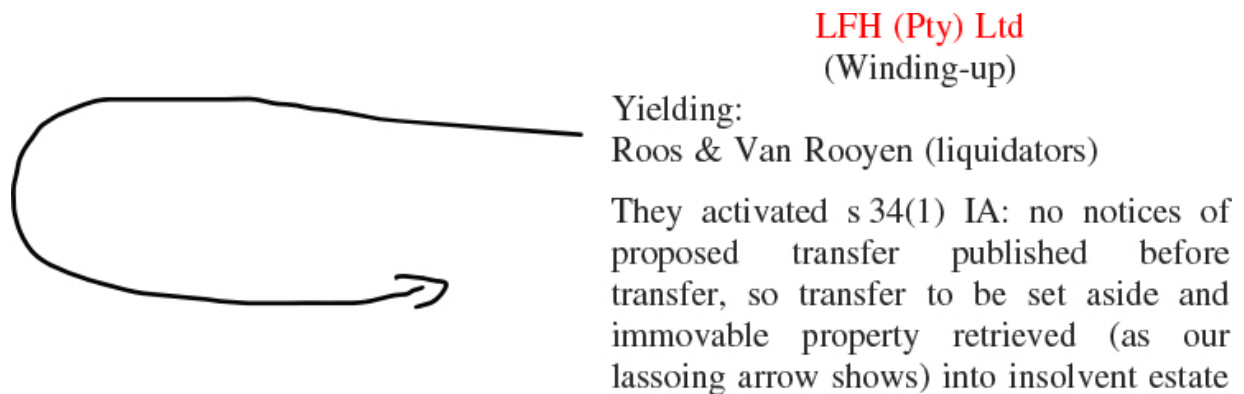
In every field of law, it is essential to understand which parties are involved in the set of facts, which roles these parties play, and which time requirements they must meet.

As promised in 1.7.3(ii), we now illustrate the use of diagrams with *Kevin and Lasia Property Investment CC & another v Roos NO & others* 2004 (4) SA 103 (SCA) <<http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/2003/149.html&query=%22480/2002%22>> (accessed on 2 September 2022). The case is briefly mentioned in para 12.6, second bullet in the discussion of s 34(1), about the transfer of the trader's business without the prescribed notice. The facts and eventual decision of the case by the court of first instance feature in para 12.6, fourth bullet.

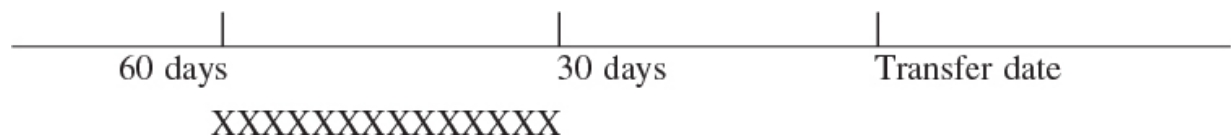
We recommend that the debtor should be marked in red as troubled, insolvent, financially distressed or at least the subject of winding-up. Here is our sketch of *Kevin and Lasia (supra)*:



Then within 6 months:



The publication period in s 34(1) can be shown in a timeline not to scale:



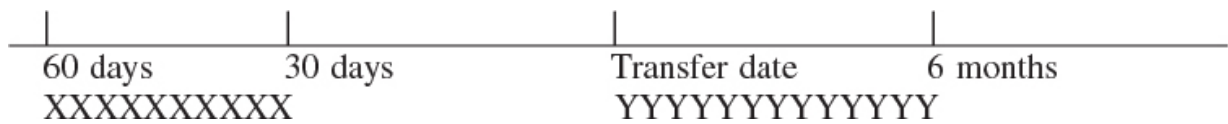
The XXXs portion shows the requirement to publish, not too early (more than 60

Page 190

days; and so to the left of the first notch) and not too late (less than 30 days; and so to the right of the second notch).

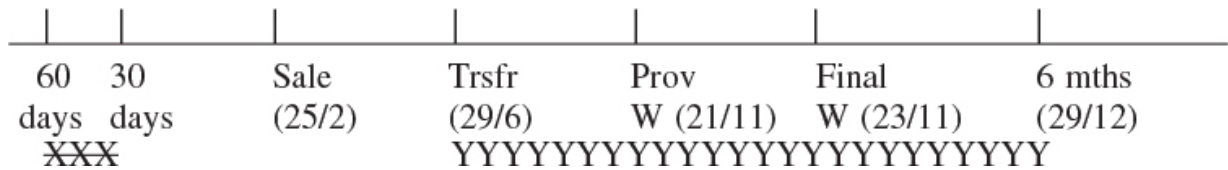
If the time requirement is not met, the transfer is void as against the trader's creditors for a period of six months after transfer, and the transfer is also void against the trustee of the trader's estate, if the trader's estate is sequestrated at any time within this period (s 34(1); see 12.6).

So another notch must be added to the general timeline to show the voidness period:



During the YYY period, the creditors and trustee may treat the transfer as void but can no longer do so after that (in other words, in the period to the right of the six-month notch). The composite timeline shows both time requirements in s 34(1) for publication and voidness, reminding the trader when to publish and the trustee and creditors when to act.

The timeline in *Kevin and Lasia (supra)* ran as follows:



The crossed-out XXXs show that LFH (Pty) Ltd never published the notice. The six months after the transfer date are six calendar months (s 2 'month' of the Interpretation Act 33 of 1957, which applies to the Insolvency Act 1936). The 1936 Act was an Act of Parliament (s 2 'law' of the Interpretation Act) that was in force at the time when the 1957 Act commenced (s 1 of the Interpretation Act). Six months after the transfer date in this case was 29/6 plus 6 equals 29/12. So the liquidators met their YYY time requirement for seeking to have the transfer set aside.

Chapter 13

Interrogation of the insolvent and other witnesses

Synopsis

- 13.1 Interrogation by trustee (or creditor or presiding officer)
 - 13.1.1 When and where interrogation may take place
 - 13.1.2 Who may be interrogated
 - 13.1.3 Who may interrogate
 - 13.1.4 Subject matter of interrogation
 - 13.1.5 Procedure at interrogation
 - 13.1.6 Privilege
 - 13.1.7 Failure to attend or submit to interrogation
 - 13.1.8 Interrogation revealing possible offence
- 13.2 Interrogation by Master

To enable the trustee and creditors to investigate the insolvent's affairs and determine his true financial position, the Act provides for interrogating the insolvent and other witnesses. The Act also empowers the Master to conduct a private interrogation. These matters are considered in this chapter.

If the trustee merely holds informal discussions to investigate matters that clearly call for a formal interrogation, he is guilty of a dereliction of duty and may have his remuneration reduced or disallowed by the Master

under s 63(1) (*Thorne v The Master* 1964 (3) SA 38 (N) 52–3).

13.1 Interrogation by trustee (or creditor or presiding officer)

13.1.1 When and where interrogation may take place

An interrogation may be conducted at any meeting of creditors (s 65(1)). It may take place, for instance, at a special meeting called for the purpose of proof of claims (*Lubbe v Estate Lubbe* 1935 CPD 299) or at a general meeting convened for the purpose of giving the trustee directions about matters concerning the administration of the estate (*Essop v The Master & another* 1983 (1) SA 926 (C)). The meeting must be properly called: the interrogation cannot proceed if it is not. In *Essop v The Master & another* (*supra*), the trustee called a general meeting for the purpose of 'interrogation of witnesses'. It was held that, under s 41, a general meeting had to be convened by

Page 192

the trustee 'for the purpose of giving him directions concerning any matter relating to the administration of the estate' and that it was not competent to call the meeting solely for the purpose of interrogating witnesses. So a subpoena requiring a witness to attend the meeting for interrogation had to be set aside. Again, in *Marques & another v De Villiers & another NNO* 1990 (4) SA 415 (W), the trustee called a special meeting for the 'further proof of claims', but his sole purpose in convening the meeting was to interrogate the insolvent and other witnesses. The court held that the meeting had not been properly convened, and so the interrogation could not proceed.

13.1.2 Who may be interrogated

The persons who may be interrogated are the insolvent and any other person present at the meeting who has been, or who might have been, summoned to appear for interrogation under s 64(2). Under s 64(2), the presiding officer at any meeting of creditors may summon any of these persons to appear at the meeting to be interrogated:

- Any person who is known, or on reasonable grounds believed, to possess or to have possessed property which belonged to the insolvent before the sequestration of his estate, or which belongs or belonged to the insolvent estate or to the insolvent's spouse.
- Any person who is known, or on reasonable grounds believed, to be indebted to the estate.
- Any person who, in the opinion of the presiding officer, may be able to give material information about the insolvent or his affairs (whether before or after sequestration), any property belonging to the estate, or the business, affairs, or property of the insolvent's spouse.

The presiding officer may also summon any person who is known, or on reasonable grounds believed, to possess any book or document containing information referred to in s 64(2), to produce the book or document (or an extract from it) at a meeting of creditors (s 64(3)). A person subpoenaed to produce documentation of a certain class in terms of this section must actually produce it—it is no answer for him to say simply that the trustee may have access to everything that he (the witness) has (*Pitsiladi v Van Rensburg & others NNO* 2002 (2) SA 160 (SE) 162).

The range of witnesses who may be summoned to appear and the documentary evidence that may be called for are extensive. The reason is evidently to allow the trustee and

creditors to investigate the affairs of the insolvent on the widest possible basis (*Yiannoulis v Grobler & others* 1963 (1) SA 599 (T) 601). Although a subpoena under s 64(2) may be expressed in wide terms, it must be limited to what is a permissible investigation under the section (cf *Pitsiladi v Van Rensburg & others NNO* (*supra*) 162).

The insolvent must attend the first and second meetings of creditors (including any adjournments) unless he has obtained the written permission of the presiding officer to absent himself (s 64(1)). This permission may only be granted after consultation with the trustee (*ibid*). The insolvent must also attend a general or special meeting if required to do so by written notice of the trustee (*ibid*).

If the insolvent or his spouse is called upon to attend a general or special meeting of creditors, he or she is entitled to an allowance out of the estate to defray necessary expenses incurred in connection with the attendance (s 65(8)). Any other

person summoned to attend a meeting for the purpose of interrogation is entitled to be paid out of the estate the fees to which he would be entitled if he were a witness in civil proceedings in a court of law (s 65(7)).

13.1.3 Who may interrogate

The interrogation may be conducted by the trustee, any creditor who has proved a claim against the estate, the presiding officer or the agent of any of these parties (s 65(1)).

13.1.4 Subject matter of interrogation

Section 65(1) provides that the insolvent or a witness may be interrogated about:

- all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate;
- any property belonging to the estate; and
- the solvent spouse's business, affairs or property (s 65(1)).

The scope of the interrogation (like the presiding officer's power to summon witnesses) is defined in the widest terms. This is necessary if the interrogation is to achieve its object: namely, obtaining a complete and detailed picture of the insolvent's estate and financial affairs. It follows that it is permissible (and not an abuse of the process) to hold an interrogation for the purpose of gathering information for possible civil litigation against parties with whom the insolvent was connected or had dealings (*Pitsiladi v Van Rensburg & others* 2002 (2) SA 160 (SE) 161–2).

In *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), it was argued that s 65(1) amounted to an unconstitutional violation of the solvent spouse's fundamental rights enshrined in the Interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), in particular her rights under the equality and property clauses, and her rights to privacy and freedom and security of the person. The court disagreed. Its reasoning appears from the following passage (*idem* 330–2):

'On the basis that it is constitutional to vest the property of a solvent spouse temporarily in the Master or trustee, it follows that the solvent spouse similarly can have no legitimate complaint to being interrogated concerning her or his own property and affairs to the extent that they are relevant to the insolvent estate. As far as reliance is placed upon ss 11(1) and 13 of the interim Constitution [ie, the clauses dealing with privacy and freedom and security of the person], it is necessary to have regard to the scope of questions which . . . a person summoned [is required] to answer [T]he first limitation . . . relates to their relevance to the purpose of the meeting. That purpose is clearly the affairs of the insolvent estate. It follows that to the extent that persons may be required to answer questions concerning the business, affairs or property of the solvent spouse, the information sought must be relevant to the estate of the

insolvent spouse A second and even wider limitation is to be found in the provisions of s 139 read with s 66(3) of the Act A presiding officer may not commit to prison . . . a person who refuses to answer a question not “lawfully put to him”. A question which would constitute an invasion of a constitutional right of an examinee cannot be said to be one “lawfully put”. To paraphrase the words of Ackermann J in *Nel v Le Roux NO & others* [1996 (3) SA 562 (CC) at para [9]] if a presiding officer at a meeting of creditors held under the Act finds that, in answering any question, the examinee’s rights under chap 3 of the interim Constitution would be infringed he or she should hold that this did not constitute a question “lawfully put” to the examinee and that a refusal to answer such a question did not therefore constitute conduct punishable by imprisonment under s 66(3) and therefore would not constitute an offence under s 139(1).’

13.1.5 Procedure at interrogation

The presiding officer may call and administer the oath to the insolvent or other witness who may then be interrogated (s 65(1)). There are no issues formulated beforehand—the inquiry is conducted for the purpose of discovery, to obtain facts which the trustee and creditors do not possess and which may be of financial benefit to the estate (*Agyrakis & another v Gunn & another* 1963 (1) SA 602 (T) 604; *Grapentin & another v Sue McGuinness Communications CC & others* 2021 JDR 2613 (GJ) para 39). The statement of any person being interrogated must be recorded in the same way as the evidence in a civil court (s 65(3)), the extent and practical effect of deficiencies determining whether and how far the record might be referred to, the test being whether the object of the statutory provision has been achieved by what was done in purported compliance with it (*Pickford & another v Engelbrecht NO & others* [2020] ZAWCHC 163 (18 November 2020) para 14). When the insolvent is interrogated, he must be required to declare that he has made a full and true disclosure of all his affairs (s 65(4)).

The presiding officer must ensure that the proceedings are conducted according to the fundamental principles of justice and that he performs his functions fairly and impartially (*Advance Mining Hydraulics (Pty) Ltd & others v Botes NO & others* 2000 (1) SA 815 (T) 824–5). The court may intervene to stop an interrogation if it amounts to an abuse of s 65, or if it is vexatious or oppressive (*Lane & another NNO v Magistrate, Wynberg* 1997 (2) SA 869 (C) 874). The presiding officer must disallow any irrelevant question and may disallow a question that would prolong the interrogation unnecessarily (s 65(1)). He should exclude questions on the latter basis if they are not calculated to produce material information about the insolvent's affairs or if the information can be obtained more readily from another source (*Agyrakis & another v Gunn & another (supra)* 605). Questions to establish the general credibility of a witness are permissible, provided they are relevant to the affairs of the insolvent (*Pretorius & others v Marais & others* 1981 (1) SA 1051 (A) 1063–4). Questions that infringe a witness's constitutional rights are not lawfully put, and he need not answer them (*Harksen v Lane NO & others* 1998 (1) SA 300 (CC) 332). The fact that the presiding officer is obliged, in certain circumstances, to hold the inquiry *in camera* (in private) (see 13.1.6) does not mean that in all other circumstances it must take place in public (*Roux v Die Meester en 'n ander* 1997 (1) SA 815 (T) 825).

A person called upon to give evidence may be assisted at his interrogation by an advocate, attorney or other agent (s 65(6)), and he is entitled to be informed of his right to this assistance (*Advance Mining Hydraulics (Pty) Ltd & others v Botes NO & others (supra)*). But he has no constitutional or other right of access to information before the inquiry—he is called to the inquiry to help provide information, not to receive it (*Pitsiladi v Van Rensburg & others NNO* 2002 (2) SA 160 (SE) 162).

A witness may be interrogated even though he is a witness in a pending civil trial about the subject of the proposed interrogation (*Pretorius & others v Marais & others (supra)* 1064).

The s 65 inquiry does not in itself lead to a decision affecting anyone who testifies there but is only to gather information. The presiding officer's role is procedural, to make sure that the proceedings are run properly and effectively (*Pickford & another v Engelbrecht NO & others (supra)* para 26).

13.1.6 Privilege

In general, the law relating to privilege applies to giving evidence or producing a book or document at an interrogation (s 65(2)). But the principles of privilege are relaxed to some extent, to allow an interrogation to achieve its intended purpose.

The Act lays down these provisions in this regard:

- A person being interrogated may not refuse to answer a question on the ground that the answer would tend to incriminate him, or on the ground that he is to be tried on a criminal charge and may be prejudiced at such trial by his answer (s 65(2) proviso).
- A banker of the insolvent or his spouse must, if summoned to do so, produce all cheques in his possession which were drawn by the insolvent or his spouse within one year of sequestration (*ibid*). If a cheque is unavailable, the banker must produce any record which he has of the payment (*ibid*). If called upon to do so, the banker must give any other information which he has about the missing cheque, or the bank account of the insolvent, or his spouse (*ibid*).

- Any evidence given at an interrogation is admissible in any proceedings instituted against the person who gave the evidence (s 65(5)).

Section 65(2A) limits the ambit of the above provisions in two respects: a presiding officer must hold the incriminating or prejudicial part of any proceedings *in camera* and prohibit the publication of any incriminating evidence (s 65(2A)(a)), and no incriminating evidence given at an inquiry may be admitted in any criminal proceedings, except in proceedings for perjury or related offences (s 65(2A)(b)). The expression 'part of the proceedings' in this context is not confined to specified or determinable questions and answers (*Harksen v The Magistrate, Wynberg & others; Lane NO & another v The Magistrate, Wynberg & others* [1997] 2 All SA 205 (C) 211–12).

The overall effect of the provisions is that an examinee cannot refuse to answer incriminating questions, and that the answers he gives may be used against him in civil proceedings and in criminal proceedings relating to perjury and related offences, but not in criminal proceedings generally (*Du Plessis NO v Oosthuizen; Du Plessis NO v Van Zyl* 1995 (3) SA 604 (O) 613; *Wessels NO v Van Tonder en 'n ander* 1997 (1) SA 616 (O) 621). The rationale here is easy to discern. The purpose of an interrogation is to obtain information about the insolvent estate which would not otherwise be disclosed to the trustee or to creditors, and which may be used to recover money or property for the benefit of the estate (cf *Pitsiladi v Van Rensburg & others NNO* 2002 (2) SA 160 (SE) 162). To achieve this purpose, it is essential that the trustee and creditors must be permitted to ascertain whether the insolvent or any other person has acted improperly or in fraud of creditors of the estate. This task would be impossible if the examinee could decline to answer questions on the basis that they might incriminate him and if the evidence elicited at the interrogation could

not be used in subsequent civil proceedings against the examinee.

The Companies Act 61 of 1973 contains a provision similar to s 65, though not identical—s 415. Section 415(5) states that *any* evidence given at an interrogation under s 415(1) of the Act is admissible in *any* proceedings instituted against the person who gave the evidence. This section thus allows for incriminating evidence given at such an interrogation to be admitted in any criminal proceedings against the person concerned (*Du Plessis NO v Oosthuizen*; *Du Plessis NO v Van Zyl (supra)*)

609). In *Parbhoo & others v Getz NO & another* 1997 (4) SA 1095 (CC), it was held that s 415(5) is constitutionally invalid to the extent that it permits the use of incriminating evidence in criminal proceedings other than those for perjury or related offences. In the light of this decision, it may be concluded that s 65(5) is constitutionally sound, since s 65(2A)(b) limits the scope of s 65(5) and prohibits the admission of incriminating evidence under the latter section in criminal proceedings, apart from proceedings on the grounds of perjury and related offences.

In *Equisec (Pty) Ltd v Rodriques & another* 1999 (3) SA 113 (W), a debtor applied to stay the granting of a final sequestration order against his estate, arguing that exposure to compulsory interrogation would prejudice him in criminal proceedings pending against him. The court rejected his application, holding that he was adequately protected by s 65(2A) because it would render incriminating evidence elicited at such an interrogation inadmissible in criminal proceedings.

Although evidence given at an interrogation is admissible in civil proceedings instituted against the person who gave

the evidence, it does not simultaneously serve as proof of the facts that it reveals. In this regard, the court must consider the evidence as a whole and decide how much weight should be given to it. The court may, if it sees fit, accord different degrees of credence or credibility to different parts of the evidence (*Du Plessis NO v Oosthuizen en 'n ander* 1999 (2) SA 191 (O) 206).

13.1.7 Failure to attend or submit to interrogation

If the insolvent or a person duly summoned to appear at a meeting of creditors fails to attend or remain in attendance at the meeting, the presiding officer may issue a warrant authorizing a member of the police to apprehend the insolvent or person summoned and bring him before the presiding officer (s 66(1)). Unless the insolvent or person summoned satisfies the presiding officer that he had a reasonable excuse for failing to appear or remain in attendance, the presiding officer may commit him to prison for a period which that officer may determine (s 66(2)). The officer in charge of the prison must then detain the person committed and produce him when and where required by the presiding officer (*ibid*).

If a party summoned to an interrogation appears, but fails to produce a book or document which he was required to produce, or if a person who may be interrogated refuses to be sworn by the presiding officer, or refuses to answer fully and satisfactorily any question lawfully put to him or does not answer the question fully and satisfactorily, the presiding officer may issue a warrant committing the party concerned to prison, where he must be detained until he has undertaken to do what is required of him (s 66(3)). In *Nieuwoudt v Faught NO en andere* 1987 (4) SA 101 (C) 109, it was held that when the party gives an answer which is incomplete or unsatisfactory, the presiding officer must

decide whether this is due to an unwillingness to testify, or whether the party has answered the question to the best of his ability. If the answer is clearly untrue or evasive, it may be considered a form of intentional refusal to answer the question. But if the answer is not nonsensical or evasive, even if it is improbable, it cannot be said that the party has failed to answer the question to the best of his ability (*ibid*). If, after being released on an undertaking to do what is required of him, the party fails to fulfil his undertaking, the presiding officer may commit him to prison as often as may be necessary to compel him to do what is required of him (s 66(4)).

A person committed to prison under s 66 may apply to the High Court for his discharge from custody, and the court may order his discharge if it finds that he was wrongfully committed or is being wrongfully detained (s 66(5)). The presiding officer enjoys the same immunity in connection with the apprehension or committal of a person as is enjoyed by a judicial officer regarding any act performed by him in the exercise of his functions (s 66(6)).

In *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC), it was argued that s 66(3) (dealing with committal for failing to produce a document, take the oath, or answer a question satisfactorily) is constitutionally invalid because it violates s 12(1)(b) of the Constitution (regarding the right not to be detained without a fair trial). The court accepted that the section is invalid, but only to the extent that it empowers a presiding officer who is not a judicial officer in the court structure established by the Constitution (in other words, a judge or a magistrate) to issue a warrant committing an examinee to prison. It seems clear that the same reasoning applies to s 66(2) (about committal for failing to appear or remain in attendance). Subsections (2)

and (3) of s 66 should both, therefore, be read subject to the qualification that a presiding officer may order committal on the grounds stipulated in the subsections only if he is recognized as a judicial officer in the court structure. In *De Lange's* case, Ackermann J remarked as follows (*idem* 824):

'It was suggested in argument that if the public service officers did not have summary committal powers this would give rise to delays which would undermine the efficacy of the sequestration process. It is not self-evident to me why this must be so if creditors' meetings and courts are efficiently run There is nothing before us to show why these public service officers cannot legitimately be accommodated in the magisterial judiciary and used exclusively to preside over creditors' meetings or why, for that matter, specialist insolvency or bankruptcy courts cannot effectively be established under the Constitution in which their expertise can also be fully employed. As judicial officers with true structural and constitutional independence, there could be no objection to them committing examinees to prison'

13.1.8 Interrogation revealing possible offence

If it appears from a statement made at an interrogation that there are reasonable grounds for suspecting that a person has committed an offence, the Master must send the statement with any necessary documents to the Director of Public Prosecutions, to enable him to decide whether any criminal proceedings should be instituted in the matter (s 67(1)).

13.2 Interrogation by Master

The Act also provides for an inquiry to be instituted by the Master whenever he considers that the insolvent, the trustee, or any other person can give information which he (the Master) considers desirable to obtain about the insolvent, his estate, the administration of his estate, or any claim or demand made against the estate (s 152(2); *Burger NO v Bester NO* 2022 JDR 0820 (CC) para 11n3). In such a case, the Master may summon the party concerned to

appear before him (or before a magistrate or an officer in the public service) at a stated time and place and give the information (s 152(2)). The Master may exercise this power at any time after sequestration (including provisional sequestration: *Appleson v The Master & others* 1951 (3) SA 141

(T)) and before the rehabilitation of the insolvent (s 152(2)). It need not be shown that an interrogation under s 64 or s 65 is impossible or impractical (*Cools v The Master & others* 1998 (4) SA 212 (C) 224–5). The Master may administer the oath to the party summoned, and then the Master and also the trustee (if the latter is not the person summoned) or his agent may interrogate that party (s 152(4)). After the interrogation, the Master may require the person to appear again and submit further information or any book or document (s 152(3)). The relevance of these documents to the insolvent's affairs outweighs the right of privacy under s 14 of the Constitution of the Republic of South Africa, 1996 (*Gumede & others v Subel NO & others* 2006 (3) SA 498 (SCA) 504–6). Specific provisions of the Act relating to interrogations by the trustee apply with the necessary changes: those concerning privilege and the giving of incriminating evidence (*Wessels NO v Van Tonder en 'n ander* 1997 (1) SA 616 (O) 620), those dealing with the failure to attend or submit to interrogation and the immunity of the presiding officer, and those governing witness fees (s 152(5)–(7)). So, for example, a witness need not attend the interrogation until offered the prescribed witness fees and allowances (*Swart en 'n ander v Cronje en 'n ander NNO* 1991 (4) SA 296 (T); *Laskarides & another v German Tyre Centre (Pty) Ltd (in Liquidation) & others NNO* 2010 (1) SA 390 (W) 399). The differences between the s 152 inquiry and the s 65 interrogation are set

out in *Stadler en andere v Wessels NO en andere* 2000 (4) SA 544 (O) 550–4.

The courts have accepted these propositions about the nature and scope of an inquiry under s 152:

- The inquiry is purely investigative in nature. The presiding officer investigates facts, but he makes no finding that can detrimentally affect anyone's rights, nor does he determine any rights (*Van der Westhuizen v Roodt & others* 1986 (1) SA 693 (N) 698; *Podlas v Cohen and Bryden NNO & others* 1994 (4) SA 662 (T) 675; *Roux v Die Meester en 'n ander* 1997 (1) SA 815 (T) 824; *Nedbank Ltd v Master of the High Court, Witwatersrand Local Division, & others* 2009 (3) SA 403 (W) 414).
- As the inquiry does not adversely affect anyone's rights, the Master need not apply the *audi alteram partem* (hear the other side) rule before deciding to hold the inquiry, and the presiding officer need not observe the *audi alteram partem* rule while the inquiry is in progress. It follows that the Master need not grant a hearing to a person summoned before issuing him with a notice to appear and that he does not have to provide reasons for his decision to hold an inquiry (*Podlas v Cohen and Bryden NNO & others (supra)* 675). Nor can the insolvent demand to be present at the examination or to be given the opportunity to cross-examine witnesses (*Roux v Die Meester en 'n ander (supra)*).
- In regulating and controlling the inquiry, the presiding officer must observe the dictates of procedural fairness. Yet this requirement does not mean that he must allow an examinee access to the information on which the decision to hold the inquiry was based (*Strauss & others v The Master & others NNO* 2001 (1) SA 649 (T) 662–3). An examinee has no

constitutional right of access to such information (under s 32 of the Constitution read with Sch 6, item 23), because the inquiry does not amount to administrative action and does not adversely affect the examinee's rights (*Strauss & others v The Master & others NNO* (*supra*) 665–6).

- The courts are empowered and obliged to restrain the use of an enquiry that would constitute an abuse (*Urquhart v The Master of the High Court* 2019 JDR 2000 (FB))

Page 199

para 11). An improper forensic advantage depends on the circumstances of the case. Examples would include summoning a witness to benefit a third party in pursuing proceedings against that witness; issuing a summons so as to obtain pre-trial discovery when a discovery order had already been refused; allowing an enquiry where the only purpose of the enquiry was to extract damaging admissions and unconvincing justifications for a possible negligence claim; or engineering an enquiry just before a trial where the liquidator as plaintiff seeks ammunition to attack the defendant.

- The inquiry need not follow any particular procedure. The presiding officer is not compelled to keep a record or notes of the inquiry and cannot be made to disclose to any person, including the examinee himself, any informal notes that he kept of the proceedings (*Stadler en andere v Wessels NO en andere* (*supra*) 554).
- A person other than the trustee is not entitled as of right to representation at the inquiry (*Appleson v The Master & others* (*supra*)). Yet the presiding officer does often allow representation. The court has said

that it is desirable that a person who is being interrogated should be allowed to have a legal adviser present to advise him of his rights (*Van der Westhuizen v Roodt & others* (*supra*) 699), especially where the interrogation may constitute a step in litigation hostile to the witness (*Hosking & another v Van der Merwe & another NNO* 1992 (1) SA 920 (W)). It has been held that as insolvency inquiries are confidential, their purpose would, to some extent, be defeated if all the witnesses were to be represented by the same legal practitioner, since questions and answers obtained during the enquiry would then immediately become common knowledge to all the witnesses (*Myburgh v The Master of the High Court Bloemfontein Free State Division, Bloemfontein NO* 2019 JDR 1698 (FB) para 16). Because of the nature of the inquiry, the court's power of review under s 151 is restricted. The court may interfere with the Master's decision to hold an inquiry only if he acted in bad faith (*mala fide*), from ulterior motives, or failed to apply his mind to the matter (*Strauss & others v The Master & others NNO* (*supra*) 656–7). The court may intervene in the inquiry itself only if it is conducted in an oppressive or vexatious manner or might result in hardship to the examinee, or if unusual, special or exceptional circumstances are present (*idem* 662).

Chapter 14

The duties of the insolvent

Synopsis

- 14.1 Delivery of records and statement of affairs
- 14.2 Delivery of assets
- 14.3 Providing assistance
- 14.4 Providing information
- 14.5 Informing trustee of addresses
- 14.6 Record of assets and disbursements
- 14.7 Attending meetings and giving evidence

To ease the trustee's task of gathering and taking charge of all the assets in the estate, the Act imposes several duties on the insolvent.

14.1 Delivery of records and statement of affairs

On being served with the final order of sequestration, the insolvent must immediately deliver to the sheriff all records relating to his affairs which have not already been taken into custody (s 16(2)(a)). Within seven days of service, he must lodge in duplicate with the Master a statement of affairs, framed substantially in the prescribed form—Form B in the First Schedule to the Act—and verified by affidavit (s 16(2)(b)). A detailed discussion of the contents of the statement of affairs appears in chapter 2. If the Master is satisfied that the insolvent cannot prepare the statement of affairs without help, the Master may allow a reasonable fee

to be paid as part of the costs of sequestration to the person who helps the insolvent (s 16(5)).

14.2 Delivery of assets

Within 14 days as from the appointment of the trustee, the insolvent must deliver to the trustee any property belonging to the estate which is in his possession (s 136(b)(i)). Failure to do so constitutes a criminal offence (*ibid*).

14.3 Providing assistance

At any time before the second meeting of creditors the insolvent must, if required by the trustee, assist him in collecting and taking charge of any property belonging to the estate (s 23(12)). In return for his assistance, the insolvent is entitled to be paid out of the estate such allowance in money or goods as the Master considers necessary to support the insolvent and his dependants (*ibid*).

Page 201

14.4 Providing information

The insolvent is obliged, on pain of criminal prosecution, to provide certain information and details to the trustee or the Master:

- Within 14 days of the trustee being appointed, the insolvent must inform him of the whereabouts of any estate property not under his (the insolvent's) control which is not fully disclosed in the statement of his affairs, or which is not already in the trustee's possession (s 136(b)(ii)). The insolvent is under a similar duty in relation to books or documents not

- under his control and which are not already in the trustee's possession (s 136(b)(iv)).
- The insolvent must, at the trustee's request, furnish complete and truthful information about any property which was in his possession, or about the time when, or manner or circumstances in which, he disposed of the property or ceased to possess it (s 136(c)). And he commits an offence if, at a meeting of creditors, when required by the trustee or the presiding officer or any creditor, he fails to disclose what has become of property which was in his possession so recently that he ought to be able to account for it (s 138(c)).
 - If the insolvent learns or suspects that a person has proved or intends proving a false claim against the estate, he must inform the Master and the trustee in writing within seven days of acquiring the knowledge or becoming suspicious (s 136(a)).
 - The insolvent is obliged, if so required by the trustee, to give a true, clear and detailed explanation of his insolvency or to account for the excess of his liabilities over his assets (s 138(b)).

14.5 Informing trustee of addresses

The insolvent must keep the trustee informed of his residential and postal addresses (s 23(13)). If any notice is required to be given to the insolvent under the Act, it may be sent by registered letter to either of these addresses (s 23(14)).

14.6 Record of assets and disbursements

The insolvent is obliged to keep a detailed record of all assets which he receives from whatever source, and of all disbursements which he makes in the course of his

profession, occupation or employment (s 23(4)). The trustee may inspect the record at all reasonable times (*ibid*). If required by the trustee, the insolvent must send him, in the first week of every month, a statement verified by affidavit of all assets received and disbursements made during the preceding month (*ibid*). The trustee may call for reasonable vouchers in support of any item in the statement (*ibid*). By examining the information so obtained, the trustee can decide whether to approach the Master in order to have a portion of the insolvent's income declared unnecessary for the support of the insolvent and his dependants in terms of s 23(5) (see 5.3.2).

Section 23(4) is deficient in so far as it does not compel the insolvent to keep his trustee informed of his income and financial position after the distribution of his capital assets. It is impractical to expect the trustee voluntarily to follow up this information without being guaranteed that his disbursements will be covered. The subsection, therefore, should be amended (*Ex parte Jacobs* 1977 (4) SA 155 (NC) 156–7).

14.7 Attending meetings and giving evidence

The duty of the insolvent to attend creditors' meetings and submit to interrogation has already been dealt with (see 13.1.2). The insolvent must, if summoned to do so, attend proceedings instituted by or against the trustee and answer any question lawfully put to him in the course of the proceedings (s 140). The failure to comply with this duty without a reasonable excuse is a criminal offence (*ibid*).

Part 5

Realization and distribution of the assets

Chapter 15:

Realization of the estate assets

- 15.1 Procedure for realization of estate assets generally
- 15.2 Special rules governing realization of particular assets
- 15.3 Realization of solvent spouse's property

Chapter 16:

Creditors' claims and their ranking

- 16.1 Types of creditors
- 16.2 Types of security conferring preference
- 16.3 Ranking of claims

Chapter 17:

The estate accounts and the distribution of the estate

- 17.1 Estate accounts
 - 17.2 Time within which accounts must be submitted
 - 17.3 Failure to submit accounts
 - 17.4 Examination of accounts by Master
 - 17.5 Inspection of accounts by interested parties
 - 17.6 Objections to accounts
 - 17.7 Confirmation of accounts
 - 17.8 Distribution of estate
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Chapter 15

Realization of the estate assets

Synopsis

- 15.1 Procedure for realization of estate assets generally
 - 15.1.1 Manner of realization
 - 15.1.2 Requirements where assets are sold by public auction/tender
 - 15.1.3 Sale in contravention of Act
 - 15.1.4 Purchase of assets by trustee
 - 15.1.5 Sale of assets before second meeting of creditors
- 15.2 Special rules governing realization of particular assets
 - 15.2.1 Goods subject to statutory lien
 - 15.2.2 Rights acquired from State in terms of lease, licence, etc
 - 15.2.3 Interest in close corporation
 - 15.2.4 Movable property held as security
 - 15.2.5 Immovable property held as security
- 15.3 Realization of solvent spouse's property

Having taken charge of the estate assets, the trustee must realize them to benefit creditors. He must also realize any property of the solvent spouse which vested in him and which he has not released. This chapter deals with the procedure for the sale of assets generally, the special rules for realizing some assets, and the procedure for selling property which belonged to the solvent spouse before sequestration.

For obvious reasons, the trustee is generally obliged to dispose of the estate assets for value, and he must dispose of *all* the assets that he is empowered to realize. But this proposition must be qualified to some extent:

- The creditors may authorize the trustee to dispose of an estate asset without receiving value in return, provided they act in good faith and in the interests of the estate and the insolvent (*Janse van Rensburg v Muller* 1996 (2) SA 557 (A) 564–5). In *Janse van Rensburg*, one of M's insolvent estate assets was a damages claim against JVR (disputed by JVR) arising from a fire on M's farm. The estate creditors were not interested in trying to enforce the claim because of the financial risks that this would involve. With M's approval, the creditors authorized a cession of the claim to M's spouse for no value. The court dismissed JVR's objection that the cession was invalid because the trustee of M's estate had been compelled to sell all its assets.

Page 206

- The interests of creditors do not go beyond the full settlement of the debts of the insolvent estate. In the rare case that the partial realization of the estate assets yields enough to meet the claims proved by creditors and the expenses relating to sequestration, the trustee need not sell the remaining assets (*Jacobs v Hessels* 1984 (3) SA 601 (T)).

The trustee may not realize certain assets: the insolvent's wearing apparel and bedding (s 82(6)). The trustee is also not allowed to sell the insolvent's household furniture, tools and other essential means of subsistence; but in relation to these assets, the creditors or, if none has proved a claim, the Master, may determine that the insolvent may keep only a portion for his own use (*ibid*). As the prohibition on selling

some assets was enacted to benefit the insolvent, he may waive the protection afforded in respect of specific assets in favour of his creditors and the trustee may then realize them (*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 125). But this renunciation has been disapproved in another court because the protection is intended to benefit debtors, their families and the public, and the protection cannot be waived (*Ex parte Kroese & another* 2015 (1) SA 405 (NWM), followed in *Ex parte Van Dyk* 2015 JDR 0667 (GP) paras 19–20). In general, if an asset to be sold is burdened with a restraint on alienation, the trustee may not sell the asset contrary to the terms of the restraint (*Engelbrecht v Mundell's Trustee* 1934 CPD 111). But an agreement not to cede a claim (*pactum de non cedendo*) is not binding on the trustee unless

- the agreement (*pactum*) itself provides or makes it clear that it applies in insolvency (*Lithins v Laeveldse Koöperasie Bpk & another* 1989 (3) SA 891 (T) 895; *Goodwin Stable Trust v Duohex (Pty) Ltd & another* 1998 (4) SA 606 (C) 618); or
- the *pactum* is contained in a lease (s 37(5)); or
- the *pactum* forms part of the contract that created the right in question. In *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C), Thring J remarked (518–19):

'[A] distinction must be drawn between a *pactum de non cedendo* which prohibits the cession of an existing right, ie one which pre-existed the conclusion of the *pactum*, on the one hand, and a *pactum de non cedendo* of a right which, by means of the *pactum* itself, was created *ab initio* as a non-transferable right, on the other. In the case of the first *pactum*, that which relates to an existing right, it will not always be enforceable; in particular, it will not bind the trustee in insolvency or the liquidator of the creditor and prevent him from executing a valid "involuntary" cession of the right to a third party in the course of carrying out his duties as trustee or liquidator. However, in the case of the second *pactum*, that which relates to a right which was created *ab initio* as a non-transferable right, the *pactum* is valid and enforceable against the world because

the right is simply inherently incapable of being transferred by anyone; and a cession of such a right contrary to the *pactum* will be putative, and of no force or effect, even if it is a so-called “involuntary” cession; in other words, it will bind even a trustee in insolvency or a liquidator of the creditor.’

The principle that rights may be created from the beginning (*ab initio*) and be binding against the liquidator was confirmed and applied in *Born Free Investments 364 (Pty) Ltd v Firststrand Bank Ltd* [2014] 2 All SA 127 (SCA).

15.1 Procedure for realization of estate assets generally

15.1.1 Manner of realization

The trustee must realize the estate assets in the manner and upon the conditions directed by creditors at the second meeting of creditors (s 82(1)). If creditors have given no directions by the final closing of the second meeting, the trustee must sell the property by public auction or public tender (*ibid*).

15.1.2 Requirements where assets are sold by public auction/tender

Every sale of estate assets by public auction or public tender (whether directed by the creditors or not) must follow notice in the *Gazette* and any other notices required by the Master (s 82(1)). The notices must accurately describe the assets (*Muller v De Wet NO & others* 2001 (2) SA 489 (W) 494–5). Without directions from creditors about the conditions of sale, the sale must be on such conditions as the Master may direct (s 82(1)).

The Act sets out directions on how a sale by public tender must be conducted. Each tenderer must send his tender in duplicate in a sealed envelope to the Master or a magistrate specified by the Master (s 82(2)). The Master or magistrate must keep the tenders unopened until the period for lodging tenders has expired (*ibid*). The trustee (or his representative) has the right to attend the opening (*ibid*). At this point, one of the duplicate tenders must be filed with the Master, and the other must be sent to the trustee (*ibid*). After the tenders are opened, no further offer for this property may be considered, and, unless the creditors or the Master have directed otherwise, the trustee must either accept the best tender or reject all the tenders and sell the property by public auction (s 82(5)).

15.1.3 Sale in contravention of Act

A sale of estate property infringing s 82 is still valid if the buyer is in good faith when he contracts (s 82(8); *Naude v Serfontein NO en 'n ander* 1978 (1) SA 633 (O)). But the trustee is liable to make good to the estate twice the amount of any loss that the estate suffers because of his wrongful action (s 82(8)). 'Good faith' here means the lack of knowledge that the trustee has no authority or is exceeding his authority (*Mookrey v Smith NO & another* 1989 (2) SA 707 (C)). A buyer must produce evidence of his good faith (*Muller v De Wet NO & others* 2001 (2) SA 489 (W)). If the buyer knew that the trustee had no authority, he is not entitled to the protection of s 82(8), even if he was in good faith about every other aspect of the transaction and believed that the sale was in the best interests of the estate (*Mookrey v Smith NO & another* (*supra*)). Section 82(8) applies to a *bona fide* purchaser of company property sold by a liquidator who was not authorized to sell the property (*Chater Developments (Pty) Ltd (in Liquidation) v Waterkloof Marina Estates (Pty) Ltd &*

another 2015 (5) SA 138 (SCA), via s 339 of the Companies Act 61 of 1973).

15.1.4 Purchase of assets by trustee

The trustee may not acquire estate property himself unless the court confirms the acquisition (s 82(7)). The same prohibition applies to an auctioneer employed to sell

Page 208

the property and to the spouse, partner, employer, employee or agent of either the trustee or the auctioneer (*ibid*). Confirmation is needed even if the person concerned buys, not personally, but in a representative capacity, eg, as a trustee (cf *Estate Jamodien v Registrar of Deeds* 1933 CPD 348). As a rule, the court will confirm a sale to the trustee if it was concluded openly and in good faith, for instance, if it took place at a public auction which was adequately advertised and the trustee's bid was the highest obtainable (cf *In re Estate Hough* 1919 CPD 160). An acquisition cannot be enforced without the court's confirmation (cf *Estate Jamodien v Registrar of Deeds* (*supra*)). But if a person hit by the prohibition acquires estate property without obtaining confirmation, and the property is later acquired in good faith and for value by some other person, the latter acquisition is valid (s 82(8)). But the person who sold or otherwise disposed of the property is liable to make good to the estate twice the amount of any loss sustained by the estate because of his actions (*ibid*).

15.1.5 Sale of assets before second meeting of creditors

In general, the trustee must await the directions of creditors given at the second meeting of creditors before he sells the

estate property. But if at any time before this, he is satisfied that movable or immovable property of the estate should be sold immediately, he may make a recommendation to this effect in writing to the Master, stating his reasons (s 80*bis*(1)). The Master may then authorize the sale of all or a portion of the property and give directions about the manner and conditions of sale (s 80*bis*(2)). If the Master has had notice that the property is subject to a right of preference, he cannot authorize the sale unless the person entitled to the right of preference has given his consent or the trustee has guaranteed the person concerned against loss resulting from the sale (*ibid*).

15.2 Special rules governing realization of particular assets

15.2.1 Goods subject to statutory lien

Goods subject to a statutory right of retention may, in some cases, be sold out of hand by the lien holder. For example, the Commissioner for the South African Revenue Service may sell property which he has impounded to secure an amount due under the Customs and Excise Act 91 of 1964 if the debt is not paid within three months of its becoming due (s 114(1) of that Act).

15.2.2 Rights acquired from State in terms of lease, licence, etc

As for any right acquired from the State under a lease, licence, purchase or allotment of land, the trustee must act according to the statute under which the right was acquired, in so far as those provisions apply (s 82(1) of the Insolvency Act).

15.2.3 Interest in close corporation

The Close Corporations Act 69 of 1984 provides for realizing an insolvent's interest in a close corporation. The trustee may sell the interest to

- the corporation itself (where the insolvent is not the sole member);

Page 209

- the members of the corporation other than the insolvent member (not necessarily in proportion to their respective interests); or
- any other person who qualifies for membership of a close corporation under s 29 of that Act (s 34(1)).

If the corporation has one or more members apart from the insolvent, and the trustee wishes to sell to a third person, these rules apply (s 34(2)):

- The trustee must deliver to the corporation a written statement containing the proposed purchaser's name and address, as well as details of the purchase price and the time and manner of payment (s 34(2)(a)).
- The corporation or the members then have the right to be substituted as purchasers of the insolvent member's interest at the price and on the terms set out in the trustee's written statement (s 34(2)(b)).
- If the corporation or the members fail to exercise this right by giving written notice to the trustee within 28 days after the corporation receives the trustee's written statement, the sale to the third person becomes effective and must be carried into effect (s 34(2)(b)–(c)).

15.2.4 Movable property held as security

Section 83 of the Insolvency Act lays down the procedure for realizing movable property held as security. Movable property is defined as every kind of property and every

right or interest which is not immovable property (s 2). The movable property is held as security for these purposes if the creditor has a preferent right over it under a special mortgage, landlord's legal hypothec, pledge or right of retention (cf the definition of 'security' in s 2). A special mortgage of movable property is a notarial bond hypothecating specially described movable property in terms of s 1 of the Security by Means of Movable Property Act 57 of 1993, or such a notarial mortgage bond registered before 7 May 1993 under the Notarial Bonds (Natal) Act 18 of 1932 (cf the definition of 'special mortgage' in s 2 of the Insolvency Act). So movable property subject to a notarial bond not governed by either the 1993 Act or the 1932 Act does not fall within s 83 of the Insolvency Act. It must be realized just like an unencumbered asset.

(i) Notice that movable security held

A creditor holding movable property as security for his claim must give written notice of this fact before the second meeting of creditors to the Master and the trustee (s 83(1)).

(ii) Realization of security by creditor

Where the property consists of a marketable security—ie, property that is usually sold through a stockbroker, a bill of exchange, or a financial instrument or foreign financial instrument as defined in the Financial Sector Regulation Act 9 of 2017, the creditor, having given the required notice (s 83(1)) and before the second meeting of creditors, may realize the property himself (s 83(2) and (8), with effect from 29 March 2018 (GN 169 *Government Gazette* 41549 of 29 March 2018)). The property is usually sold through an authorized user or an external authorized user, on an exchange or an external exchange (each as defined in s 1(1) of the Financial Markets Act 19 of 2012), or, where

applicable, through a person prescribed by the Minister of Finance as a regulated person under s 5 of the Financial Markets Act (see s 83(8)(a) of the Insolvency Act).

Special rules apply (s 83(10A), also from 29 March 2018) if the property is held as security in favour of a secured creditor for obligations arising out of a master agreement defined in s 35B(2) (see the Insolvency Act in Appendix 2 for the full definition, and 7.9) or a transaction referred to in s 35A (ie, a transaction on a market infrastructure (see 7.8)). The process includes eligible collateral under the applicable standards or rules made under the Financial Sector Regulation Act 2017 or the Financial Markets Act 2012. In brief: the secured creditor may keep the proceeds of realizing the security but must notify the trustee or the Master in writing, with a confirming affidavit about the conclusion of the master agreement or the s 35A transaction and the nature and details of the claim and the realized security. A process is also provided for disputing this claim (s 83(10B)).

A bill of exchange may be realized in any way approved of by the trustee or the Master (s 83(8)(b)).

As for all other movable property held as security, the trustee has the right to take over the property at a value agreed upon between him and the creditor or (failing agreement) at the full amount of the creditor's claim (s 83(3)). The trustee must make his election within seven days from the receipt of the notice referred to above (s 83(1)) or from the date of his appointment, whichever is the later (s 83(3)). Should the trustee not choose to take over the property within the seven days, the creditor may, after allowing the trustee a reasonable opportunity to inspect the property, but before the second meeting of

creditors, sell the property by public auction (s 83(3) and 83(8)(d)). But the creditor cannot sell a right of action without the approval of the trustee or the Master (s 83(8)(c)). The creditor must give notice of the time and place of the proposed auction as directed by the trustee (s 83(8)(d)). On giving directions to the creditor about notice of the sale, the trustee must inform the other creditors in writing about when and where the sale is to take place (s 83(9)).

After realizing the property as provided above (except for property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in s 35B(2) or a transaction referred to in s 35A), the creditor must immediately pay the net proceeds to the trustee (s 83(10)) and prove his claim, attaching to the affidavit in proof of claim a statement of the proceeds of the realization and the facts on which he relies for his preference (s 83(5)). After that, provided the claim is proved and admitted as envisaged by s 44 and the trustee is satisfied that it was, in fact, secured by the property realized, the creditor is entitled to payment from the proceeds (s 83(10)). If the trustee disputes the preference, the creditor may either object to the trustee's account when it is lodged with the Master (see 17.6) or apply to court for an order compelling the trustee to pay him immediately (s 83(10)).

It is not a requirement for payment that the trustee must be satisfied that the estate does owe the claim: the section requires simply proof of the claim under s 44, which is no more than formal proof. It merely establishes that the creditor is *prima facie* entitled to payment—see 9.2.3(vii). So the creditor may insist on receiving payment even if the trustee doubts the validity of the claim and wants time to read it carefully and investigate it (*Grufin Finance Co (Pty) Ltd v Cohen & others NNO* 1991 (2) SA 345 (W)). In such a case, though, the creditor should make provision for

repayment in case the trustee later establishes that the claim is not well founded.

Before making the payment, the trustee should obviously estimate the amount of the costs payable from the proceeds of the property (for these costs, see 16.3.1(i)) and then either withhold the required amount or make provision for it to be paid on demand.

In *Alert Steel (Pty) Ltd (in liquidation) v Mercantile Bank Limited* 2022 JDR 1743 (SCA), the liquidators had sold the company's assets and later claimed the repayment of an amount received by a secured creditor. The liquidators alleged that the receipt did not accord with ss 44 and 83(10) because the creditor did not prove a claim in the company's estate. The company failed to prove the requirements of an enrichment claim. In fact, the real reason for the litigation was the liquidators' wish to recover their fees. The Supreme Court of Appeal confirmed that trustees and liquidators who pay a creditor before the liquidation and distribution account has been confirmed do so at their own risk.

(iii) Security not realized by creditor

If the creditor does not realize the property before the second meeting of creditors, he must, as soon as possible after the second meeting begins, deliver the property to the trustee for the benefit of the insolvent estate (s 83(6)). Should he not do so within three days after the meeting begins, the trustee may demand delivery of the property. If the property is not delivered, the Master, at the trustee's request, must direct the sheriff to attach and deliver the property to the trustee (*ibid*). The creditor does not lose the benefit of a right of retention or landlord's hypothec by delivering the property to the trustee if, when delivering the

property, he informs the trustee in writing of his rights and proves a claim at the right time (s 47).

Once the trustee has received the property, the creditor may prove his claim, placing a value on the property as s 44(4) requires (s 83(7); see 9.2.3(i)). If authorized by the creditors, the trustee may then take over the property at the value placed on it by the creditor (s 83(11)). The trustee must do so within three months of his appointment or from the date of proof of the claim, whichever is the later (*ibid*). If he does not take over the property within this period, he must realize it to benefit all creditors whose claims are secured by it, according to their respective rights (*ibid*).

(iv) Effect of non-compliance with requirements of Act

The creditor's failure to take the procedural steps set out above does not mean that he may refuse to hand over the property or its proceeds to the trustee (*Venter NO v Avfin (Pty) Ltd* 1996 (1) SA 826 (A); cf *Louw NO v Sobabini CC* 2016 JDR 0198 (ECG) para 57). Nor does it mean that he is precluded from proving a claim and having it paid by the insolvent estate (*Standard Bank of South Africa Ltd v Townsend & others* 1997 (3) SA 41 (W)). In *Venter's* case, the secured creditor (A) realized its security (certain equipment) without complying with the formalities of s 83. It did not notify the trustee that it held the property as security, did not realize the property before the second meeting of creditors or in the manner provided for in s 83(8) and (9), and did not prove its claim. The court rejected A's argument that A was not obliged to pay the sale proceeds to the liquidator under s 83(10) because the realization had not taken place under s 83. Scott AJA explained (*idem* 833–4):

'At common law a creditor who held movable property as security for his claim could not realise it himself. He had to deliver it to the trustee who

had the right to administer it subject to the preference of the creditor in relation to the proceeds derived from its realisation

Page 212

Section 83, however, permits a creditor who holds movable property as security for his claim, subject to certain limitations, to retain possession of such property and to realise it himself. But once the property is realised he must pay the proceeds to the trustee. The provisions in s 83(10) requiring him to do so are consistent with the general scheme of the Act and, to the extent that the trustee is entitled to receive such proceeds, with the common law. Viewed against this background it could not, I think, have been intended that a creditor by his own non-compliance with the provisions of the Act could notionally place himself in a more favourable position *vis-à-vis* the trustee and avoid his statutory obligation to pay over the proceeds to the trustee. That the trustee may himself have failed earlier to recover the property in terms of s 83(6) does not detract from the obvious anomaly which would result from such a construction In my view, therefore, the reference in [section 83(10)] to the preceding provisions was intended to be no more than a general reference to the realisation of securities as contemplated in the earlier subsections of s 83. It was not intended to import into s 83(10) a requirement of compliance with those subsections as a precondition to the obligation of the creditor to pay over the proceeds of his security to the trustee.'

15.2.5 Immovable property held as security

Unlike movable property held as security, which the secured creditor may realize (see above), immovable property held as security must generally be realized by the trustee according to the directions of creditors given at their second meeting or, in the absence of directions, by public auction or public tender. Under the common law, the trustee is entitled to take possession of the property before realizing it, even when it is the subject of a right of retention (*Roux en andere v Van Rensburg* NO 1996 (4) SA 271 (A); *Ex parte Van der Merwe* 2008 (6) SA 451 (W) 457). The holder of the right of retention or a landlord's legal hypothec who gives up possession to the trustee retains the benefit of his security, provided he notifies the trustee of this right when delivering the property and later proves a claim (s 47).

Conceivably, the immovable property subject to a mortgage bond may also be subject to another real right. Examples may be a *fideicommissum* (a grant of property to a person subject to a condition that he will hand over the property to a third party), a usufruct, the right of a lessee under the 'huur gaat voor koop' rule, or the right of a sharecropper under a partiarian lease. How the property must be realized is affected by the relative preference of the competing rights:

- If the other real right is preferent to the mortgage bond, the property must be sold subject to the preferent real right (*Bell & Co v Ivins & Edmonds* (1905) 26 NLR 449). The bondholder must content himself with the net proceeds of the sale (whatever they may be), and the bond must then be cancelled (*ibid*).
- If the bond ranks in preference to the other real right, the property may be sold free of the other right, but only if it cannot be sold for a sum sufficient to satisfy the claim of the bondholder (*United Building Society Ltd & another NO v Du Plessis* 1990 (3) SA 75 (W) 80). The procedure to be followed in this regard is the following (*ibid*; cf *Lubbe v Volkskas Bpk* 1992 (3) SA 868 (A) 875, dealing with competing preferent claims in a sale in execution):
 - The trustee should first try to sell the property subject to the other real right.
 - If the proceeds would be enough to satisfy the mortgagee's claim, the property must be sold subject to the other real right (*United Building Society Ltd & another NO v Du Plessis (supra)*).

- If the highest offer obtained cannot satisfy the mortgagee's claim (or if it is established by other

means that an adequate price will not be achieved), the holder of the other right has the opportunity of meeting the mortgagee's claim. If he does meet the claim, the property is freed of the mortgage and it must then be sold, subject to the other real right, to benefit the creditors. If he does not meet the mortgagee's claim, the property must be realized free of the other real right (see *Van der Vyver v Estate Van der Vyver* 1932 CPD 45—*fideicommissum*; *Timm v Kay & another* 1954 (4) SA 585 (T)—lease (see 7.6.1); *United Building Society Ltd & another NO v Du Plessis* (*supra*)—usufruct; *Lubbe v Volkskas Bpk* (*supra*)—the right of a sharecropper under a partiarian lease).

In *Velcich & others v Land and Agricultural Bank of South Africa & others* 1996 (1) SA 17 (A), the court acknowledged that the procedure described above is the accepted one. Yet the court held that non-compliance with this procedure would not necessarily lead to the invalidity of the sale. The property in *Velcich* was subject to a lease and had been advertised free of the lease from the outset and sold for far less than the outstanding mortgage debt. In the circumstances of the case, the court was prepared to assume that the highest bid would have been even lower if the property had been put up for sale subject to the lease. The court held that the realization of the property was valid and that the lease had thus not survived the sale. The court's ready acceptance of the assumption was criticized (Kritzinger (1996) 113(2) *SALJ* 209). The sensible view is that the trustee bears the onus of proving that a sale subject to the lease would not have brought in a sum sufficient to satisfy the prior mortgage (*Shell Rhodesia (Pvt) Ltd v Eliasov NO* 1979 (3) SA 915 (R) 921 (*obiter*); to be contrasted with *Oosthuizen v Human* 1911 EDL 273 280,

holding that the lessee bears the onus (see Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 583–4); see 7.6.1).

Rather than realizing the property, the trustee may, if authorized by creditors

- abandon the property to the secured creditor as payment in kind to discharge his claim against the estate (*United Building Society Ltd & another NO v Du Plessis (supra)* 81);
- take the property over at the value placed on it by the creditor when his claim was proved (s 83(11)). The taking over must occur within three months from the date of the trustee's appointment or the date on which the claim is proved, whichever is the later (*ibid*). If the trustee does not take over the property within this period, he must realize it to benefit all creditors whose claims are secured by it, according to their respective rights (*ibid*). If two or more creditors have a special mortgage over the same property, each creditor is deemed to have valued only his preferent right to the property, and the trustee may take over only that right, not the property itself (*ibid*).

15.3 Realization of solvent spouse's property

Section 21(1) empowers the trustee to deal with the solvent spouse's property that vests in him as though it were the property of the sequestrated estate. But under s 21(3), the trustee may only realize property that 'ostensibly belonged' to the solvent spouse if he has given her (or him) six weeks' written notice of his (the trustee's) intention to do so, unless the solvent spouse is outside the Republic, or the trustee cannot ascertain her (or his) address, or the court has given leave to sell the property without notice. The

expression 'ostensibly belonged' is not defined in the Act. But it seems safe to assume that the expression refers to property registered in the name of the solvent spouse or in her (or his) possession at the time of vesting (cf *Van der Bergh v Insolvent Estate Van der Bergh* 1931 CPD 1) and not yet released by the trustee because there is some doubt over the true ownership of the property. Notice of the intended sale must also be published in the *Gazette* and in a newspaper circulating in the district where the solvent spouse resides or carries on business. It must invite all separate creditors for value of the solvent spouse to prove their claims as provided in s 21(5) (s 21(3)). The trustee does not concede that this property does belong to the solvent spouse by giving notice of the sale. The onus remains on the solvent spouse to establish that the property falls within one of the categories mentioned in s 21(2) of the Act (*Constandinou v Lipkie NO* 1958 (2) SA 122 (O); see 6.2.1).

Under s 83(13), the provisions of s 83 apply, with the necessary changes, to the solvent spouse's movable property held as security by a creditor for value of that spouse.

Chapter 16

Creditors' claims and their ranking

Synopsis

- 16.1 Types of creditors
 - 16.1.1 Concurrent creditors
 - 16.1.2 Secured creditors
 - 16.1.3 Preferent creditors
- 16.2 Types of security conferring preference
 - 16.2.1 Special mortgage
 - 16.2.2 Landlord's legal hypothec
 - 16.2.3 Pledge
 - 16.2.4 Right of retention
 - 16.2.5 Instalment agreement hypothec
- 16.3 Ranking of claims
 - 16.3.1 Encumbered assets
 - 16.3.2 Unencumbered assets (free residue)

As explained in chapter 1, the main objective of insolvency law is to ensure that an insolvent debtor's assets are distributed among his creditors according to a predetermined and fair order of preference. This chapter distinguishes between the different types of creditors and explains the order in which and the extent to which each is entitled to be paid.

16.1 Types of creditors

Three types of creditors are identified for ranking purposes: concurrent, secured and preferent.

16.1.1 Concurrent creditors

Concurrent creditors do not enjoy any advantage over the other creditors of the insolvent. Concurrent creditors are paid out of the free residue after any preferent creditors have been paid. The 'free residue' is defined as that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention (s 2). It is, in other words, the unencumbered part of the estate.

Concurrent creditors all rank equally: should the free residue be insufficient to meet their claims (as it usually is), each receives an equal proportion of his claim by way of a

Page 216

dividend. So, if the free residue amounts to R5 000 and A has a concurrent claim for R6 000 and B for R4 000, then A and B will each receive a dividend of 50 cents in the rand (or one-half of their respective claims, ie, A—R3 000 and B—R2 000).

16.1.2 Secured creditors

A secured creditor is one who holds security for his claim in the form of a special mortgage, landlord's legal hypothec, pledge or right of retention (s 2 *sv* 'security'). A brief description of these forms of security is given below. The definition in s 2 contemplates real security only: a creditor whose claim is secured by suretyship is not secured for the purposes of the Act.

A secured creditor is entitled to be paid out of the proceeds of the property subject to the security, after the payment of certain expenses (see 16.3.1(i)) and any secured claim that ranks before his (see 16.3.1(ii)). If the proceeds of the encumbered property are insufficient to cover the secured creditor's claim, he has a concurrent

claim for the balance (*Singer NO v The Master & another* 1996 (2) SA 133 (A)).

Under s 89(2), a secured creditor may, when proving his claim, choose to rely exclusively on his security. In doing this, this creditor waives, by implication, any right to participate in the free residue, and it is not open to him to argue later that he proved an incorrect claim as envisaged in s 44(4). Having made his election, he cannot later undo it (*Eastern Free State Cape Co-operative Ltd v The Master & others* 1997 (3) SA 899 (E) 906–7; *Absa Bank Ltd v The Master & others NNO* 1998 (4) SA 15 (N) 25–31). But he may still proceed against a surety for the balance of his claim if the realization of the security does not yield enough to discharge the claim (*BOE Bank Ltd v Bassage* 2006 (5) SA 33 (SCA) 37–9).

Section 89(2) requires the creditor to make an unequivocal election when submitting his claim form. The section does not apply, for example, if the creditor states that he will elect in the future whether to rely solely on the proceeds of his security, or that he elects to do this if there is a danger of a contribution being payable, but not otherwise (*Snyman v The Master & others* 2003 (1) SA 239 (T) 242–3). In *Eastern Free State Co-operative Ltd v The Master & others (supra)*, the creditor stated simply that ‘the creditor relies on its security for payment of its claim’. It was held that these words, read in context, fell short of a statement that the creditor would look solely to the proceeds of its security to satisfy its claim. So the creditor was not precluded from sharing in the free residue for the satisfaction of the balance of its claim.

The option of relying solely on the security is not as unfavourable as it might at first seem since, as will appear in chapter 17, a secured creditor who relies solely on his security is less likely to be called upon to contribute towards the costs of sequestration than one who elects to preserve

his right to share in the free residue (17.1.4(i)). The creditor must, in each case, consider whether there is any chance of his security not realizing enough to pay his claim and, if there is such a possibility, whether there is any prospect of creditors being made to pay a contribution.

16.1.3 Preferent creditors

The term 'preferent creditor' may be used in a wide sense to refer to any creditor who is entitled to receive payment before other creditors (cf the definition of 'preference' in s 2). A secured creditor qualifies as a preferent creditor in this broad sense. But the term

Page 217

'preferent creditor' is usually reserved for a creditor whose claim is not secured but still ranks above the claims of concurrent creditors.

The Insolvency Act creates preferences for the following claims:

- funeral and death-bed expenses (s 96);
- costs of sequestration (s 97);
- costs of execution (s 98);
- salary or remuneration of employees (s 98A);
- statutory obligations (s 99);
- income tax (s 101); and
- claims of holders of general bonds and certain special bonds (s 102).

The Companies Act 71 of 2008 inserts a new preference for the business rescue practitioner's fees and expenses (s 135). This preference ranks below the costs of execution and above the salary and remuneration of employees in the list above.

These claims are described in more detail in the discussion on the ranking of claims (see 16.3.2).

A preferent creditor is entitled to payment out of the free residue of the estate, ie, that portion which is not subject to any security interest. Between themselves, the various categories of preferent creditors rank in a predetermined order of preference laid down by the Act. Some of the preferences conferred by the Act are limited to maximum amounts (see below). If a claim exceeds the statutory maximum, the creditor concerned has a concurrent claim for the balance.

16.2 Types of security conferring preference

16.2.1 Special mortgage

The definition of 'special mortgage' in s 2 embraces the following:

- a mortgage bond hypothecating immovable property;
- a notarial bond hypothecating specially described movable property in terms of s 1 of the Security by Means of Movable Property Act 57 of 1993—this Act came into operation on 7 May 1993;
- a notarial bond hypothecating specially described movable property registered before 7 May 1993 in terms of s 1 of the Notarial Bonds (Natal) Act 18 of 1932. The 1932 Act was superseded by the Security by Means of Movable Property Act.

The definition excludes any other bond hypothecating movable property: so a general notarial bond does not qualify as a special mortgage. But it does confer a preference in respect of the free residue of the estate (see 16.3.2(viii)). A bond registered under s 31 of the Ship Registration Act 58 of 1998 is deemed to be a special bond as defined in s 2 (s 31(5) of the Ship Registration Act 58 of 1998).

Section 88 of the Insolvency Act lays down that a bond (other than a kustingbrief (which is explained below)) gives no security or preference if

- the estate of the debtor was sequestrated within six months after the lodging of the bond with the Registrar of Deeds for registration;
- the debt was incurred more than two months before the lodging of the bond; and
- the debt was not previously secured.

Page 218

A conditional debt is incurred for these purposes when the condition is met (*Joint Liquidators of Glen Anil Development Corporation Ltd (in Liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A)).

Section 88 is obviously aimed at the creditor who only takes steps to obtain the protection of a secured claim once the debtor's insolvency is imminent; the section is not intended to restrict the passing of bonds generally. So the section does not apply if the debt had already been secured and the bond was intended merely to replace that security. But the section *does apply* if only some of the debt, and not the whole debt, was previously secured. In *Volkskas Bpk v Meester van die Hooggeregshof en 'n ander* NO 1987 (4) SA 192 (NC), a bond had been registered to secure an overdraft facility and, when the facility was increased, a second bond was registered. As only part of the debt secured by the second bond had previously been secured, that bond enjoyed no preference.

Section 88 mentions a kustingbrief as an exception to the general rule in that section. A kustingbrief is a type of special mortgage bond. At the same time as he receives transfer of the immovable property, the purchaser passes the kustingbrief in favour of the seller for the purchase price

or a third person who has lent the money to pay the purchase price (*In re Insolvent Estate of Buissinne Van der Byl and Meyer v Sequestrator and Attorney-General* (1828–1849) 1 Menz 318). The kustingbrief, which is registered with the deed of sale, takes preference over mortgages registered after the kustingbrief.

The period of prescription applicable to a debt secured by a special notarial bond is 30 years (*Factaprops 1052 CC & another v Land and Agricultural Development Bank of South Africa* 2017 (4) SA 495 (SCA)). In *Botha v Standard Bank of South Africa Ltd* 2019 (6) SA 388 (SCA), the question was raised whether the cancellation of a mortgage bond, after the debt has become due and prescription has begun to run, has the effect of altering the prescription period of the debt from 30 years to three years. The Supreme Court of Appeal agreed with the court *a quo* that even if a mortgage bond has become valueless as security, it retains its classification and character despite the cancellation, as the law of prescription is not concerned with security.

16.2.2 Landlord's legal hypothec

A landlord who is owed rent has a hypothec over movable property brought on to the leased premises for use by the tenant and over all crops raised by the tenant on the premises. On insolvency, the landlord has a secured claim regarding all movable assets owned by the insolvent which are covered by the hypothec (s 85(2)). The claim is secured up to an amount of

- three months' rent, if the rent is payable monthly or at shorter intervals;
- six months' rent, if the rent is payable at intervals exceeding one month but not more than three months;
- nine months' rent, if the rent is payable at intervals exceeding three months but not more than six

- months;
- 15 months' rent, if the rent is payable at intervals exceeding six months (s 85(2)(a)–(d)).

The landlord has a concurrent claim for any excess. He obtains no preference in relation to goods belonging to third parties that are subject to the hypothec (*Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk* 1988 (3) SA 266 (C)).

16.2.3 Pledge

A valid pledge is constituted where movable property is delivered to a creditor on the understanding that he will keep it until his claim has been satisfied. Movable incorporeal property is pledged by means of a cession *in securitatem debiti* (*Bank of Lisbon and South Africa Ltd v The Master & others* 1987 (1) SA 276 (A)). The holder of a general notarial bond over movables who obtains possession of the movables under a court order authorizing him to exercise his rights under a perfection clause is in the position of a pledgee (*Development Bank of Southern Africa Ltd v Van Rensburg & others* NNO 2002 (5) SA 425 (SCA) 436–7; *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd & others* 2003 (2) SA 253 (SCA) 258–60; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) 506–8).

16.2.4 Right of retention

Broadly speaking, a party has a right of retention (or lien) over specific property belonging to another if he (the first party) has expended labour or incurred expenses in respect of the property of the second party. Liens arise automatically by operation of law. There are two types of liens: enrichment liens, and debtor and creditor liens.

Enrichment liens are so called because they are based on unjustified enrichment. There are two kinds: salvage liens and improvement liens. The holder of an enrichment lien may retain the property until compensated for his expenses and labour. But he cannot insist on being paid more than the amount by which the owner has actually been enriched. The lessee of urban property enjoys this lien for necessary and useful improvements to the immovable property (*Business Aviation Corporation (Pty) Ltd & another v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA)). By contrast with enrichment liens, debtor and creditor liens secure an amount due under a contract in which the first party undertook to repair or improve the second party's property at an agreed price. A creditor who holds a debtor and creditor lien is entitled to retain the property as against the debtor until the latter has paid him the agreed consideration.

As a rule, for a party to have a lien, he must possess the property. But this does not apply to a lien arising under the Admiralty Jurisdiction Regulation Act 105 of 1983 (*Euromarine International of Mauren v The Ship Berg & others* 1984 (4) SA 647 (N) 652).

16.2.5 Instalment agreement hypothec

If movable property has been delivered to a debtor under an instalment agreement, the seller acquires, on sequestration, a hypothec over the property which secures his claim for the balance outstanding under the contract (s 84(1); and see 7.2.8).

16.3 Ranking of claims

The Act 'ranks' the various claims against the insolvent estate: that is to say, the Act lays down the order in which the claims must be paid and to what extent each claim

must be paid. For the purposes of distribution, the estate consists of the proceeds of both the encumbered and the unencumbered assets. The proceeds of each encumbered asset are applied to pay the claim (or claims) secured by that asset. Any balance remaining after the payment of secured creditors is combined with the proceeds of the unencumbered assets to pay the remaining creditors. These moneys (known as the 'free residue') are applied first to satisfy preferent claims (in their order of preference) and then to pay the claims of concurrent creditors. When two or more preferent claims rank equally and the amount available is not enough to satisfy them in full, they abate (and are thus reduced) in equal proportions. When the balance of the free residue remaining after settling all preferent claims cannot pay all concurrent creditors in full, the claims of those creditors are paid proportionately. In the rare case of a balance remaining after all concurrent claims have been paid in full, post-sequestration interest is payable on those claims at a prescribed rate.

Distribution of the proceeds of the encumbered and unencumbered assets (free residue) takes place as explained below.

16.3.1 Encumbered assets

(i) Initial costs

Under s 89(1), the proceeds of each encumbered asset must be applied to the payment of certain costs before payment of the claim(s) secured by the asset. The creditors to whom these costs are owed cannot recover them by proving claims against the estate (*Standard Bank of South Africa Ltd v Townsend & others* 1997 (3) SA 41 (W) 58). The costs are these:

- the costs of maintaining, conserving and realizing the asset in question, eg, the costs of a night-watchman, auctioneer's commission, a sectional title levy (s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986; *Nel NO v Body Corporate of the Seaways Building & another* 1996 (1) SA 131 (A); *Barnard NO v Regspersoon van Aminie en 'n ander* 2001 (3) SA 973 (SCA)) and water, sewerage and other charges paid to a local authority to obtain a clearance certificate for registration of transfer (*Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO* 2001 (1) SA 360 (SCA) 370–1);
- the trustee's remuneration in respect of the asset (for the rate of remuneration, see Tariff B in the Second Schedule to the Act);
- a proportionate share of the costs incurred by the trustee in giving security;
- a proportionate share of the Master's fees (for these fees, see the Third Schedule to the Act);
- if the asset is immovable property, any tax which is, or will become, due on it
 - for a period not exceeding two years immediately preceding the date of sequestration; and
 - for the period from the date of sequestration to the date of transfer of the property;
 - together with any interest or penalty which may be due on the tax.

In *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd & another* 2013 (3) SA 611 (SCA), the Supreme Court of Appeal clarified that if the period of a prohibition in any law is effectively shorter than the two-year period provided for in s 89(1) of the Insolvency Act, the shorter period will

apply after sequestration, as the latter is intended to limit and not to extend embargo provisions (see Kunst, Boraine and Burdette *Meskin's Insolvency Law* para 12.4.4.1). The court also confirmed that '[t]he words of s 89(4) (namely that a law which prohibits transfer of immovable property, unless any tax due thereon has been paid, shall not debar a trustee from transferring the property if the trustee has paid the tax for the period mentioned in s 89(1)) lend themselves to the interpretation that the object of s 89 was to provide a remedy to a trustee by limiting the impediment created by embargo provisions' (*idem* 617); and that 's 89 limits the embargo provision only where the debt is a tax as defined therein and that it imposes no limitation at all on the periods over which other debts mentioned in such embargo provisions have become due' (*idem* 617–18).

In *City of Johannesburg v Kaplan NO & another* 2006 (5) SA 10 (SCA) 19–20, it was held that in so far as debts due to a municipality for rates and services are not taxes for the purposes of s 89, they are a charge on the property and enjoy preference over a mortgage bond on the property under s 118(3) of the Local Government: Municipal Systems Act 32 of 2000. And the period of this preference is limited only by prescription (see *City of Tshwane Metropolitan Municipality v Mathabathe & another* 2013 (4) SA 319 (SCA); *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd & another* (*supra*)). In *City of Tshwane Metropolitan Municipality v Mathabathe & another* (*supra*), the Supreme Court of Appeal clarified that s 118 provides two different remedies. Section 118(3) provides the municipality with security for the payment of the amount owed to it, which ranks in preference over a registered mortgage bond on the proceeds of the property and is not related to a time limit,

while s 118(1) represents an embargo provision connected to a time limit. In addition, in *Jordaan & others v City of Tshwane Metropolitan Municipality & others* 2017 (6) SA 287 (CC), the Constitutional Court interpreted s 118(3) so as not to infringe s 25(1) of the Constitution of the Republic of South Africa, 1996, which provides for the right not to be deprived of property arbitrarily. When property is transferred, the new owner is not liable for the debts arising from the charge upon the property under s 118(3) (the 'historical debt'). This charge does not survive the transfer and is not transmissible. Making the new owner pay for historical debt would be a double debit amounting to an arbitrary deprivation of property that would be unconstitutional. On this interpretation, s 118(3) was held to be constitutional.

Where there are funeral and death-bed expenses and the free residue cannot defray them, the deficiency must be paid out of the secured assets in proportion to their value (s 96(4)). So, if the deficiency is R600 and there are two encumbered assets, one realizing R90 000 and the other R30 000, then R450 is chargeable to the proceeds of the former asset, and R150 to the proceeds of the latter. (The arithmetic works as follows: add the values of the two assets' proceeds (R90 000 and R30 000) together for a total of R120 000. Start with the lower proceeds (R30 000) and calculate those as a fraction of the R120 000 total proceeds: R30 000 divided by R120 000 equals $\frac{1}{4}$. Then multiply the R600 deficiency by $\frac{1}{4}$ to obtain R150. As a shortcut, deduct that R150 from the R600 deficiency to find the R450 chargeable to the higher (R90 000) proceeds.)

(ii) Secured claims

After payment of the above costs, the balance of the proceeds of the encumbered asset, including any interest earned on the price obtained for the asset (*Singer NO v The Master & another* 1996 (2) SA 133 (A)), must be applied to the payment of all claims secured by the asset, in the proper order of preference (s 95(1)).

Interest due on a claim for a period not exceeding two years immediately preceding the date of sequestration is secured as if it were part of the capital sum (s 89(3)). Interest from the date of sequestration to the date of payment is also secured (s 95(1)). The applicable rate is 8 per cent per annum unless the claim bears a higher rate in terms of a stipulation in writing, in which event interest must be calculated at the rate stipulated (s 95(1) read with s 103(2)). The 8 per cent provided for by the Act is simple, not compound, interest (*Boland Bank Ltd v The Master & another* 1991 (3) SA 387 (A)).

Secured claims rank among themselves:

Immovable property

- enrichment lien;
- special mortgage bond(s) (and contract recorded to terms of the Alienation of Land Act (see 7.3.2(ii)) in the order in which they were registered or recorded;
- debtor and creditor lien (*D Glaser & Sons (Pty) Ltd v The Master & another NO* 1979 (4) SA 780 (C); *Land-en Landboubank van Suid-Afrika v Cogmanskloof Besproeiingsraad* 1992 (1) SA 217 (A) 244).

Movable property

- enrichment lien;
- pledge (including a statutory pledge, such as that created by s 30 of the Land and Agricultural Development Bank Act 15 of 2002);
- special notarial bonds in the order in which they were registered;

- debtor and creditor lien;
- instalment agreement hypothec;
- landlord's hypothec.

Not all of these security interests can exist simultaneously over the same movable asset:

- A lien and a pledge cannot exist together because they both require possession of the property by the creditor in order to exist.
- A landlord's hypothec cannot exist over the property if
 - the property is hypothecated by a notarial bond governed by the Security by Means of Movable Property Act 57 of 1993, unless the hypothec was perfected by attachment before the bond was registered; or
 - the property is subject to an instalment agreement as defined in s 1 of the National Credit Act 34 of 2005 (s 2 of the Security by Means of Movable Property Act 57 of 1993).

As mentioned above (see 16.1.2), should the proceeds of the security be insufficient to cover the sum payable to the secured creditor, he is entitled to rank as a concurrent creditor for the balance unless he has chosen to rely solely on the proceeds of his security.

16.3.2 Unencumbered assets (free residue)

The trustee must distribute the free residue to the creditors in the order of preference laid down in ss 95 to 104 of the Insolvency Act. The trustee and the insolvent cannot validly agree to depart from this scheme of distribution. In *Commissioner, South African Revenue Service v Stand Two Nine Nought Wynberg (Pty) Ltd & others* 2005 (5) SA 583 (SCA), it was argued that an insolvent might arrange with his trustee or liquidator to pay in full the claim of a

particular estate creditor. The court pointed out (*idem* 586–7) that giving effect to such an agreement would enable the parties to subvert the scheme of distribution laid down by the Act. Whatever agreement the trustee might have concluded had to yield to his statutory duty to recover and reduce into possession all the insolvent's assets and distribute the proceeds according to law.

(i) Funeral expenses

The free residue must be applied, in the first place, to defraying the expenses of

- the funeral of the insolvent, if he died before the trustee's first account was submitted to the Master; and
- the funeral of the insolvent's wife or minor child, if these expenses were incurred within three months immediately before sequestration (s 96(1)).

Funeral expenses enjoy preference to a maximum amount of R300 (*ibid*).

(ii) Death-bed expenses

After the payment of funeral expenses (not exceeding R300), any balance of the free residue must be applied to paying the death-bed expenses of

- the insolvent, if these expenses were incurred before the trustee's first account was submitted to the Master; and
- the insolvent's wife or minor child, if these expenses were incurred within three months immediately before sequestration.

Again, the preference does not exceed the sum of R300 in all (s 96(2)). 'Death-bed expenses' means expenses incurred for medical attendance, nursing and medical necessities (s 96(3)). The claims regarding death-bed expenses rank *pari passu* (simultaneously and in equal

measure; without preference) and abate in equal proportions, if necessary (*ibid*).

Given the current funeral and medical costs, these monetary limits in the respective subsections which were last amended in 1983 render these preferences virtually meaningless today.

(iii) Costs of sequestration

Next, any balance of the free residue must be applied in defraying the costs of sequestration (s 97(1)). The costs of sequestration, in the order in which they must be paid, are

- the sheriff's charges incurred since sequestration (eg, for attaching and making an inventory of the estate assets);
- the Master's fees; and
- miscellaneous charges (s 97(2)) consisting of
 - the taxed costs of sequestration (including the costs of opposition to the application, if the court so orders: see 3.4);

Page 224

- the fee allowed by the Master to a person who helped the insolvent or his spouse draw up a statement of affairs after sequestration (see 6.1.2 and 14.1);
- the remuneration of a *curator bonis* (if any);
- the remuneration of the trustee (and presumably also the provisional trustee);
- all other costs of administration and liquidation, including
 - costs incurred by the trustee in giving security for the proper performance of his duties; completing executory contracts; maintaining, conserving and realizing

- unencumbered assets; and litigating in connection with the estate;
- expenses incurred by the Master or presiding officer at a meeting of creditors in protecting the estate assets or observing the provisions of the Act;
- rent owed for any period after sequestration;
- the salary, wage or fees of any person engaged by the *curator bonis* or trustee in connection with the administration of the estate.

The above miscellaneous charges rank *pari passu* among themselves and must abate in equal proportions, if necessary (*ibid*).

(iv) Special preferences under the Companies Act 2008 when liquidation superseded business rescue

Since the ranking of claims under the Insolvency Act applies also to companies and close corporations being wound up and unable to pay their debts (see s 339 of the Companies Act 61 of 1973 and the introduction to chapter 23), brief mention should be made of claims that will rank immediately after the costs of liquidation if the business rescue proceedings are superseded by a liquidation order. Section 135(3) of the Companies Act creates preferences for the following:

- fees and expenses owing to the business rescue practitioner;
- unpaid remuneration and other employment-related amounts owed to employees in respect of the period of the company's business rescue proceedings; and
- amounts due to other creditors who provided post-commencement financing, in the order in which they were incurred.

If a liquidation order supersedes business rescue proceedings, the s 135 preference continues in force, save to the extent of claims arising from the costs of liquidation (s 135(4)).

The ranking of post-commencement claims in business rescue proceedings is discussed in 27.3.2.

(v) Costs of execution

If any free residue remains after the costs of sequestration and, where applicable, special preferences under the Companies Act 2008 have been paid, it must be applied in defraying

- the taxed fees of the sheriff in connection with any execution upon the insolvent's property and the proceedings leading to that execution; and
- any other taxed costs in those proceedings, not exceeding R50 (s 98(1)).

The amount paid must not exceed the proceeds of the property in question if the property was under attachment or if the proceeds of the sale were in the hands of the execution officer at the date of sequestration (*ibid*). The attachment of property in

Page 225

execution confers no preference on the judgment creditor other than that provided for here (s 98(2)).

(vi) Salary or remuneration of employees

Any balance of the free residue is then applied to paying the following:

- any salary or wages due to an employee, for a period not exceeding three months (s 98A(1)(a)(i) of the Insolvency Act), to a maximum of R12 000;

- any payment in respect of any period of leave or holiday due to an employee which has accrued as a result of his being employed by the insolvent in the year of insolvency or the preceding year, whether or not payment is due at the date of sequestration (s 98A(1)(a)(ii)), to a maximum of R4 000;
- any payment due in respect of any other form of paid absence for a period not exceeding three months before the date of sequestration (s 98A(1)(a)(iii)), to a maximum of R4 000;
- any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage-regulating measure, or as a result of termination under s 38 (s 98A(1)(a)(iv)), to a maximum of R12 000;
- any contributions which were, immediately before sequestration, owing by the insolvent in his capacity as employer (including contributions payable in respect of any of the employer's employees) to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or to any similar scheme or fund (s 98A(1)(b)), to a maximum of R12 000 in respect of each scheme or fund (not each employee). 'Unemployment fund' for these purposes does not include the Unemployment Insurance Fund referred to in s 6 of the Unemployment Insurance Act 30 of 1966. (This 1966 statute was repealed (s 70 of the Unemployment Insurance Act 63 of 2001), and the assets, liabilities, rights and obligations of the Unemployment Insurance Fund were transferred to the fund of the same name (para 3 of Schedule 1, read with s 4).)

The maximum amounts referred to above are determined by the Minister under s 98A(2)(a) (GN R865 in *Government Gazette* 21519 dated 1 September 2000). This section

empowers the Minister (after giving the prescribed notice to interested parties: s 98A(2)(d)) to determine maximum amounts payable under s 98A(1) to ensure that the balance of the free residue is applied equitably. The Minister may also, from time to time, change these maximum amounts to take into account subsequent fluctuations in the value of money (s 98A(2)(b)). It is noteworthy that these maximum amounts have not been changed in 22 years.

An employee is entitled to be paid his wages, leave pay and other payments mentioned in s 98A(1)(a) without proving a claim under s 44 (s 98A(3)). But the trustee may require the employee to submit an affidavit in support of his claim (*ibid*).

The claim for salary or wages ranks before all the other claims mentioned in s 98A(1) (s 98A(4)(a)). And the claims for leave pay, other paid absence, and severance or retrenchment pay are preferred to the claims for contributions to the various funds or schemes (s 98A(4)(b)). The claims for leave pay, other paid absence, and severance or retrenchment pay rank equally and abate in equal proportions, if necessary (s 98A(4)(b)). The same applies to the various claims for contributions (s 98A(4)(c)).

Page 226

The Minister may, after consultation with the National Economic Development and Labour Council (Nedlac), by notice in the *Gazette*, exclude categories of employees schemes or funds from the operation of s 98A on certain specified grounds (s 98A(6)). The Minister has exercised his powers under this provision and excluded directors of companies and members of close corporations (GN R865 in *Government Gazette* 21519 dated 1 September 2000). This exclusion means that company directors and close corporation members have none of the preferent claims

under s 98A(1) but will rank as concurrent creditors. Ordinary workers will thus stand a better chance of receiving payment of their claims against the company or corporation.

Pay as you earn tax (PAYE tax) need not be deducted from the amounts payable under s 98A (*Commissioner for the South African Revenue Service v Pieters & others* 2020 (1) SA 22 (SCA) 26–7).

(vii) Statutory obligations

Next, the balance (if any) of the free residue must be applied in defraying certain statutory obligations owed by the insolvent before the sequestration of his estate (s 99(1)). The obligations are, broadly, the following:

- any amount due to the Compensation Commissioner under the Compensation for Occupational Injuries and Diseases Act 130 of 1993;
- any tax (including interest on it up to the date of sequestration, but excluding any penalties chargeable) which the insolvent deducted or withheld:
 - from an employee's remuneration;
 - from royalties paid to a non-resident;
 - from interest paid to a non-resident;
 - from a benefit under an insurance policy;
 - as agent for the Commissioner for the South African Revenue Service, from a pension, salary, wage or other remuneration;

but did not pay to the Commissioner for the South African Revenue Service;

- any amount (together with interest) due to the Mines and Works Compensation Fund under the Occupational Diseases in Mines and Works Act 78 of 1973 (ie, where the insolvent is or was the owner of a mine);
- any customs, excise, sales duty, interest, penalty or fine due under the Customs and Excise Act 91 of

- 1964;
- any amount provided to the insolvent by the State from the National Supplies Procurement Fund for a purpose contemplated in the National Supplies Procurement Act 89 of 1970;
- any value-added tax, interest, fine or penalty due by the insolvent under the Value-Added Tax Act 89 of 1991;
- any contribution, penalty or other payment owed by the insolvent in his capacity as an employer to the Unemployment Insurance Fund under the Unemployment Insurance Contributions Act 4 of 2002.

The above claims rank *pari passu* and must abate in equal proportions, if necessary (s 99(2)).

(viii) Income tax

After all the above costs and claims have been paid, the balance of the free residue is applied in paying any tax on income or profit and interest on tax for which the insolvent is personally liable by statute in respect of any period before the date of sequestration (s 101).

(ix) Claim secured by general bonds

Next to be paid are creditors who hold general bonds and also creditors who hold special bonds over movable property, registered before 7 May 1993, other than special bonds registered in Natal (s 102). The scope or extent of the preference corresponds with the value of the net proceeds of the property hypothecated under the bond that has been included in the free residue: in a general notarial bond, this would be the net proceeds of all the insolvent's unencumbered movables (*FirstRand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA

38 (SCA)). While the extent of the preference is so limited to the value of the goods that 'secured' the claim, the claim still ranks against the entire free residue (s 1(3) of the Security by Means of Movable Property Act 57 of 1993). After all, the free residue is one fund made up of the proceeds of all unencumbered movable and immovable assets as well as the balance of the proceeds of encumbered assets after satisfaction of the secured claims. If the net proceeds of the bonded movables included in the free residue are less than the claim of the general bondholder, the balance of his claim ranks against the free residue as a concurrent claim.

(x) Claims of concurrent creditors

Any balance of the free residue remaining after payment of all the above must be distributed among

- concurrent creditors (s 103(1)(a));
- secured creditors whose claims exceed the sums payable to them from the proceeds of their respective securities and who did not state in their affidavits submitted in proof of their claims that they relied solely on the proceeds of their respective securities for the satisfaction of their claims (ss 83(12) and 89(2); see 16.1.2); and
- preferent creditors for the non-preferent balance of their claims (s 103(1)(a)).

The balance must be distributed among the various creditors in proportion to the amounts owing to each of them (s 103(1)(a)). A creditor who is owed more than one debt is not entitled to apportion the payment he receives according to common-law principles governing the appropriation of payments (*Douglas Green Bellingham v Green t/a Greens Bottle Recyclers* 1998 (1) SA 367 (SCA) 372).

If any amount remains after paying concurrent claims, it must be applied to the payment of interest on these claims, from the date of sequestration to the date of payment, in proportion to the amount of each claim (s 103(1)(b)). The interest must be calculated at the rate of 8 per cent per annum or, if the claim bears a higher rate of interest because of a stipulation in writing, then at such higher rate (s 103(2)). The interest provided for in s 103(2) is simple, not compound, interest (*Boland Bank Ltd v The Master & another* 1991 (3) SA 387 (A)). At the same time, since the full excess of the claim of a secured creditor, including interest, ranks under s 103(1)(a) (*Singer NO v The Master & another* 1996 (2) SA 133 (A)), a secured creditor may in effect receive compound interest. Capitalized interest remains interest and does not

become part of the capital amount for the purposes of the *in duplum* rule (*Casey & another v FirstRand Bank Ltd* 2014 (2) SA 374 (SCA) 378). (Under the *in duplum* rule, interest, whether accruing as simple interest or as compound interest, stops accumulating on any amount of capital owing once the accrued interest equals the amount of the capital outstanding.)

Chapter 17

The estate accounts and the distribution of the estate

Synopsis

- 17.1 Estate accounts
 - 17.1.1 Liquidation account
 - 17.1.2 Trading account
 - 17.1.3 Plan of distribution
 - 17.1.4 Plan of contribution
 - 17.1.5 Combined plan of distribution and contribution
- 17.2 Time within which accounts must be submitted
 - 17.2.1 Normal period
 - 17.2.2 Shorter period
 - 17.2.3 Extended period
- 17.3 Failure to submit accounts
- 17.4 Examination of accounts by Master
- 17.5 Inspection of accounts by interested parties
- 17.6 Objections to accounts
- 17.7 Confirmation of accounts
- 17.8 Distribution of estate
 - 17.8.1 Payment of dividends
 - 17.8.2 Collection of contributions

After the trustee has realized the assets, his next task is to draw up the estate accounts and, once they have been confirmed, to distribute the money available as required by the Act (or to collect a contribution towards costs if the proceeds of the assets prove to be insufficient).

17.1 Estate accounts

The trustee must frame a liquidation account, setting out the amounts he received and expended, and a plan to distribute the proceeds of the estate available to pay creditors (s 91). If the proceeds cannot cover sequestration costs, the trustee must frame a plan of contribution, apportioning the liability for the deficiency among creditors who are liable to contribute (*ibid*). In practice, the trustee invariably also draws up a bank reconciliation statement to indicate which expenses and claims are still to be paid from the estate bank account and facilitate correct provision for future payments. When the trustee has carried on business on behalf of the estate, he must prepare, along with a liquidation account, a trading account setting out various details relating to the business (s 93).

Page 230

Each of the required accounts is described below.

The trustee may not have recovered or realized all the known assets of the estate by the time he is called upon to lodge a liquidation and distribution account. Additional assets may only emerge (eg, through the process of investigation or fortuitously) after he has filed an account and made a distribution. In such cases, the trustee must file a second liquidation and distribution account and, if necessary, further accounts after that. It follows that just because the trustee calls a particular liquidation and distribution account a 'final' account does not mean that it is necessarily the last account to be filed in the estate. In fact, until the rehabilitation of the insolvent, there is no way of being sure that the estate property has been fully dealt with (*Cools v The Master & others* 1998 (4) SA 212 (C) 221).

17.1.1 Liquidation account

(i) Contents

The liquidation account must accurately record all moneys received or disbursed by the trustee other than in the course of a business carried on for the estate (s 92(1)). (Money received or spent in the course of a business must be reflected in a trading account—see below.) The amount and date of each receipt or disbursement must be set forth, as well as sufficient particulars to explain its nature (s 92(2)). The account must be accompanied by the trustee's bank pass book and vouchers supporting the receipts and disbursements (s 92(3)). If the account is not the final liquidation account, it must set forth the following:

- all property still unrealized;
- all outstanding debts due to the estate; and
- the reasons why that property has not been realized or those debts have not been collected (s 92(4)).

When the estate of a partnership is under sequestration, separate accounts must be framed in the estate of the partnership and in the estates of each partner whose estate is under sequestration (s 92(5)). The trustee must sign every account that he submits to the Master. He must also verify by affidavit that the account is a full and true account of his administration of the estate and that, as far as he is aware, all the estate assets have been disclosed in the account (s 107).

(ii) Division into encumbered asset section and free residue section

In practice, the liquidation account is divided into two sections—the encumbered asset section and the free residue section. The encumbered asset section deals with the assets held as security, ie, subject to a special mortgage, legal hypothec, pledge or right of retention. This

section sets out the proceeds of each asset (or group of assets) and the claims and other charges to which that asset (or group) is subject. It is common practice to place under a separate heading, or draw up a separate account for, each encumbered asset (or group of assets) and the items chargeable against it.

The free residue section of the liquidation account is often called the 'Free Residue Account'. It reflects the proceeds of the assets which are not held as security—in other words, the free residue—and the claims and other charges paid from this portion of the estate.

17.1.2 Trading account

Section 93 provides that if the trustee has carried on any business on behalf of the estate, he must submit, along with the liquidation account, a trading account containing the following information and no other:

- a record of the value of the stock on hand on the date of sequestration;
- a record of the value of the stock on hand on the date up to which the account is drawn up;
- the daily totals of receipts and payments in connection with the business; and
- the result of his conduct of the business.

17.1.3 Plan of distribution

As the name suggests, a plan of distribution shows how the proceeds of the assets in the estate are distributed. The Act requires a plan of distribution to show the following in parallel columns under separate headings:

- every claim, or the part of every claim, which is secured or otherwise preferent;

- every claim, or the part of every claim, which is unsecured and otherwise non-preferent;
- the amount awarded under that plan and every previous plan of distribution to every creditor of the estate; and
- the deficiency in each claim (s 94).

In practice, it is customary (although there are small variations) to have separate parallel columns for the following information:

- the number of the claim, as numbered by the presiding officer at the meeting at which the claim was proved;
- the name of the creditor;
- the nature of the claim;
- the total amount of the claim;
- the secured or preferent portion, if any, of the claim (this may be the full claim);
- the concurrent portion, if any, of the claim (this may be the whole claim);
- the dividend awarded for the claim;
- the dividend awarded under any previous account(s);
- the deficiency in the claim (if any).

At the end of each column, the sum of the amounts in that column is given.

17.1.4 Plan of contribution

(i) Liability to contribute

If the proceeds of a secured asset are not enough to pay the initial costs mentioned above (see 16.3.1(i)), the deficiency must be paid by the creditors whose claims are secured by the asset, each being liable for a proportional (*pro rata*) amount (s 89(1)). When there are insufficient funds in the free residue to meet the costs of sequestration mentioned in s 97 (see 16.3.2(iii)), the shortfall must be

made good by all creditors who have proved claims against the estate (s 106). Also liable is the sequestrating creditor who applied for the sequestration order, regardless of whether or not he proved his claim against the estate (s 14(3); *FirstRand Bank Ltd v Master of the High Court, Pretoria & others* 2021 (4) SA 115 (SCA) 128). Creditors enforcing their right of preference without needing to

prove their claims (eg, employees (s 98A; see 16.3.2(vi))) need not contribute unless they choose to prove their claims.

(ii) The liability to contribute of creditors ranking on the free residue

The contribution to the costs of sequestration must be paid by concurrent creditors and by secured creditors who would have been entitled to share in the free residue, if there had been any (ss 106, 83(12) and 89(2)). A concurrent creditor ranks last on the free residue for the payment of his claim (see 16.1.1 and 16.3.2(x)). A secured creditor receives payment first from the proceeds of his security (see 16.1.2). For the unpaid balance (ie, the total amount of his claim minus the proceeds of the security), he has a right to prove a claim against the free residue as a concurrent creditor (s 83(2); *Singer NO v The Master & another* 1996 (2) SA 133 (A)). If he proves this claim, he is liable to contribute (s 106). He may choose not to prove this claim (and so waive his right to take part in the free residue) and therefore avoid liability to contribute, and he does this by stating in his proof of claim that he relies only on the proceeds of his security to satisfy his claim (s 89(2); see 16.1.2).

Concurrent creditors must contribute in proportion to the amounts of their respective claims, and secured creditors

must contribute in proportion to the amounts for which they would have ranked against the free residue (s 106).

(iii) The sequestrating creditor's liability to contribute

Even if the sequestrating creditor has not proved a claim, he is still liable to contribute as if he had proved a claim for the amount stated in his sequestration application (s 14(3)). Section 14(3) prevents him from seeking the sequestration and then not proving a claim, leaving other creditors to bear the costs (*FirstRand Bank Ltd v Master of the High Court, Pretoria & others* (*supra*) 130). He must always contribute (*idem* 128). If ss 106, 14(3) and 89(2) are read together, s 106 applies to the sequestrating creditor whether or not he proves his claim, and so he must be treated like a creditor who has proved his claim (*idem* 129).

There is not always a sequestrating creditor. This would be the case where the insolvent voluntarily surrendered the estate, or, in relation to companies and close corporations, it is a voluntary winding-up or the winding-up application was brought by someone other than a creditor (see 23.2.3). It is submitted that to be regarded as a sequestrating creditor under s 14(3), the applicant must rely on a claim. Accordingly, a business rescue practitioner who applies for the liquidation of a company on the basis that there is no longer a reasonable prospect of rescue should not be liable to contribute unless, of course, he proves a claim for remuneration.

(iv) Secured creditors' liability to contribute

A secured creditor who relies exclusively on his security will be liable to contribute only in exceptional circumstances. This gives effect to the purpose of s 89(2) to insulate a secured creditor from liability for costs that have in the first

place not been incurred in his interest, given that he does not rank upon the free residue (*FirstRand Bank Ltd v Master of the High Court, Pretoria & others* 2021 (4) SA 115 (SCA)).

If no concurrent creditors have proved claims and there are no secured creditors who would have been entitled to take part in the free residue, then the secured creditors who would not have ranked upon the free residue must pay the deficiency,

Page 233

each in proportion to the amount of his claim (s 106(a)). Because a sequestrating creditor is liable as if he has proved a claim (see (iii) above), secured creditors who rely exclusively on the proceeds of their security would only be liable to contribute if, in addition to there being no proven concurrent claims or secured creditors ranking on the free residue, there is also no petitioning creditor (see (iii) above). Secured creditors might also be liable in terms of s 118(2) if the contributions provided for in the accounts can eventually not be recovered from contributors.

(v) The unsecured but still preferent creditor's liability to contribute

Section 106 refers only to secured creditors (see 16.1.2) and non-preferent creditors (therefore the concurrent creditors; see 16.1.1). And s 106(c) mentions two types of creditors:

- those who would have ranked upon the surplus had there been any; and
- 'the remaining creditors whose claims have been proved against the estate [and] who would not have ranked upon the surplus'.

These 'remaining creditors' are the unsecured but still preferent creditors (see 16.1.2). As preferent creditors they are entitled to payment before the unsecured concurrent creditors (see 16.1.1), and they would not share in the surplus if there was one (*Ongevallekommissaris v Die Meester en andere* 1989 (4) SA 69 (T) 76–7). These creditors can be held liable for paying a contribution in proportion to their claims if the following requirements are met:

- there are proved creditors;
- all the proved creditors have withdrawn their claims; and
- the contribution relates only to costs incurred after the last proved concurrent claim has been withdrawn (Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 10 ed (2019) para 22.4.5).

This situation would also mean that there was no sequestrating creditor who could be levied for a contribution (see *FirstRand Bank Ltd v Master of the High Court, Pretoria & others* (*supra*); see 17.1.4(iii) and (iv)).

(vi) Form of plan of contribution

Section 105 provides that a plan of contribution must show in parallel columns:

- each claim in respect of which the claiming creditor is liable to contribute; and
- the amount which he is liable to contribute.

In practice, separate parallel columns are usually created for these details:

- the number of the claim;
- the name of the creditor;
- the amount of the claim;
- the amount in respect of which the creditor is liable to contribute (in the case of a secured creditor whose security does not yield enough to pay the full amount

- due and who does not rely solely on the security to obtain satisfaction of his claim, this will be less than the total amount of the claim);
- the amount of the contribution.

17.1.5 Combined plan of distribution and contribution

Often a distribution is made on some claims while a contribution is levied in respect of others. In this case, it is appropriate for the trustee to draft both a plan of distribution and a plan of contribution or a combined plan of distribution and contribution.

17.2 Time within which accounts must be submitted

17.2.1 Normal period

The trustee has a period of six months after his appointment in which to draw up the required accounts and submit them to the Master (s 91). If he cannot submit a final liquidation account, he must submit a periodical one every six months (called the 'First', 'Second', etc liquidation account) until he can file a final account (s 92(4)).

17.2.2 Shorter period

If the trustee has funds on hand which, in the opinion of the Master, should be distributed among creditors, the Master may direct the trustee in writing to submit an account, even though the prescribed period has not yet elapsed (s 110(1)).

17.2.3 Extended period

If the trustee cannot submit an account within the prescribed period, he must apply to the Master for an extension of time (s 109(1)). The application must be made before the prescribed period has elapsed or within such further period as the Master may allow (*ibid*). The trustee must submit to the Master an affidavit stating the following:

- the reasons for his inability to submit the account concerned;
- any details required by the Master about transactions, affairs and matters of importance relating to the insolvent or the estate;
- the amount available for payment to creditors, or if there is no or insufficient free residue, the deficiency the creditors are liable to make good (s 109(1)(a)).

The trustee must also send a copy of this affidavit by registered post to every creditor who has proved a claim against the estate (s 109(1)(b)). If the Master refuses to give an extension, the trustee may apply to court for an order extending the period (s 109(3)).

17.3 Failure to submit accounts

If the trustee fails to submit an account in time, the Master or any person having an interest in the estate may serve a notice on the trustee requiring him

- to submit the account concerned to the Master; or
- if he cannot submit the account, to submit the affidavit contemplated in s 109(1) (see above) to the Master and send a copy to each proved creditor, within 14 days from the date of the notice (s 109(2)).

The Master may extend the latter period (*ibid*). If he refuses to do so, the trustee may apply to court for an extension (s 109(3)).

If the trustee fails to

- submit an account as and when required;

- submit any vouchers in support of his account; or

- comply with any reasonable demand of the Master for information or proof about the account

then the Master, or any other interested person, may apply to court for an order directing the trustee to remedy his default (s 116*bis*(1)). The trustee must be given 14 days' notice of the intended application (*ibid*). If costs are awarded against the trustee, he must pay them *de bonis propriis* (ie, out of his own funds) unless otherwise ordered by the court (s 116*bis*(2)).

17.4 Examination of accounts by Master

The Master is required to examine the draft accounts submitted by the trustee. He must study the relevant supporting documents and correlate them with the accounts. If the trustee has disputed any claims against the estate, the Master must ensure that the procedure prescribed in s 45(3) for dealing with disputed claims has been followed. The Master is under a duty to apply his mind honestly to the matter, and if he fails to do this, his subsequent confirmation of the account will be invalid (*Wilkens v Potgieter NO & another* 1996 (4) SA 936 (T) 940).

17.5 Inspection of accounts by interested parties

After the accounts have been examined and approved by the Master, the trustee must give notice that they will lie for inspection at the Master's Office and the office of the

magistrate in the district where the insolvent resided or carried on business before sequestration (if not the same district as the Master's Office) (s 108(1)–(2)). For the purposes of the Act, the districts of Wynberg, Simonstown or Bellville are considered to fall under the Master in Cape Town (s 108(1)). The trustee must send a duplicate set of accounts to the relevant magistrate (*ibid*). Notice must be given in the *Gazette* and in one Afrikaans and one English newspaper circulating in the district where the insolvent resided or carried on business, in the same manner as notice of a second meeting of creditors is given (ss 108(2) and 40(3); and see also 9.1.2). The accounts must be open for inspection by creditors at the office of the Master and that of the magistrate (where applicable) for 14 days from the date of publication in the *Gazette* (s 108(3)). A magistrate who has received a trustee's account must

- put up a notice stating that he has received it and when it will lie open for inspection (s 108(4));
- when the period for which the account had to lie for inspection has expired, endorse on the account a certificate to the effect that it has duly lain for inspection and then forward the account to the Master (s 108(5)).

17.6 Objections to accounts

At any time before confirmation of the accounts (as to which see below), the insolvent or any person interested in the estate may lay before the Master a written objection to the accounts, stating the reasons for his objection (s 111(1)). The Master must consider whether the objection is valid and may then direct the trustee to amend the account or give such other directions as he deems fit (s 111(2)). If any person feels aggrieved at the direction given by the Master, or at his refusal to sustain an

objection, he may apply to court for an order setting aside the Master's decision (s 111(2)(a)). If the direction of the

Master affects a person who has not lodged an objection with the Master, the accounts must again be advertised and lie open for inspection (s 111(2)(b)). The Master may, of his own accord, direct that an account be amended if he considers that it is incorrect or contains an improper charge, or that the trustee acted in bad faith (*mala fide*), negligently or unreasonably in incurring costs included in the account (s 111(2)).

17.7 Confirmation of accounts

If the accounts have duly lain for inspection, and

- no objection has been lodged; or
- an objection has been lodged but withdrawn or not sustained and no application has been made to court to set aside the Master's decision; or
- the accounts have been amended after an objection was sustained and have again been advertised and lain for inspection;

the Master must confirm the accounts (s 112).

The Master's confirmation of the accounts is final (provided he has followed the proper procedure and honestly applied his mind to the matter: *Gilbey Distillers & Vintners (Pty) Ltd & others v Morris NO & another* 1991 (1) SA 648 (A) 656). It follows that the accounts may not be reopened except with the court's permission (s 112; *First National Bank of SA Ltd v Cooper NO & another* 1998 (3) SA 894 (W) 897). As the grounds for reopening the account before payment of any dividend are not stated in the Insolvency Act, the courts are guided by the common law. This requires proof of one of the grounds for granting

restitutio in integrum (return to the previous legal position), such as fraud or reasonable error, and something more than ignorance and prejudice (*P G Bison Ltd v Johannesburg Glassworks (Pty) Ltd (in Liquidation)* 2006 (4) SA 535 (W) 540; *Cronje NO & others v Hillcrest Village (Pty) Ltd & another* 2009 (6) SA 12 (SCA) 27). The applicant must also show that there is merit in the reopening of the account and that he has some prospect of having it varied or corrected (*Wispeco (Pty) Ltd v Herrigel NO* 1983 (2) SA 20 (C) 28). The court takes a strict approach to these applications, although the grounds are not limited to fraud or reasonable error (*Morris and Strydom NNO v The Master & others* 1994 (2) SA 731 (N); *FirstRand Bank Ltd & others v Magistrate, Germiston & others* [2004] 2 All SA 629 (W) 639). The court cannot grant permission once a dividend has been paid under the accounts (s 112), not even if the confirmation of the accounts was based on an error such as the Master's ignorance of material facts (*Gilbey Distillers & Vintners (Pty) Ltd & others v Morris NO (supra)* 656–8; *FirstRand Bank Ltd & others v Magistrate, Germiston & others (supra)* 638).

The finality of the account, however, does not preclude an action against the trustee in his personal capacity if he drew up the account fraudulently (*Kommissaris van Binnelandse Inkomste en 'n ander v Willers en andere* 1994 (3) SA 283 (A) 325–6).

17.8 Distribution of estate

As soon as the trustee's accounts have been confirmed, he must give notice of this confirmation in the prescribed form in the *Gazette* and then distribute the estate and collect from each creditor liable to contribute the amount for which he is liable (s 113(1) and (3)).

17.8.1 Payment of dividends

The trustee must lodge with the Master the creditors' receipts as proof of payment of dividends (s 114(1)). Dividends that have not been paid out within two months from the date of confirmation of the accounts must be paid into the Guardian's Fund for the account of the creditor (s 114(2)).

17.8.2 Collection of contributions

If a contribution is to be levied against creditors, the trustee must state this fact in the notice of confirmation of the accounts published in the *Gazette* and specify fully in the notice the address at which payment of contributions is to be made (s 113(1)). The trustee must also deliver or send by registered post a copy of the notice to every creditor liable to contribute (ss 113(2) and 118(1)). If a creditor fails to pay the amount of his liability within 30 days of the delivery or posting of the notice, the trustee may take out a writ of execution in the magistrate's court (s 118(1)).

Part 6

Composition and rehabilitation

Chapter 18: Composition

- 18.1 Common-law compromise
- 18.2 Offer of composition in terms of section 119
- 18.3 Acceptance of section 119 composition
- 18.4 Consequences of section 119 composition
- 18.5 Illegal inducement to accept composition

Chapter 19: Rehabilitation

- 19.1 Automatic rehabilitation after ten years
 - 19.2 Rehabilitation by court within ten years
 - 19.3 Effect of rehabilitation
 - 19.4 Declaratory order regarding property
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Chapter 18

Composition

Synopsis

- 18.1 Common-law compromise
- 18.2 Offer of composition in terms of section 119
 - 18.2.1 Submission of offer to creditors via trustee
 - 18.2.2 Terms of composition
- 18.3 Acceptance of section 119 composition
- 18.4 Consequences of section 119 composition
 - 18.4.1 All concurrent creditors bound
 - 18.4.2 Restoration of property to insolvent
 - 18.4.3 Restoration of property to solvent spouse
 - 18.4.4 Trustee to frame accounts, administer composition and report to creditors
 - 18.4.5 Right to prompt rehabilitation
- 18.5 Illegal inducement to accept composition

A debtor who is in financial difficulty or whose estate has been provisionally sequestrated can avert insolvency by entering into a compromise with his creditors (*Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 241). And a debtor whose estate has been sequestrated finally may obviate the usual process of liquidation of the estate assets and shorten the period of his insolvency by making a compromise with his creditors under s 119 of the Act. These two forms of compromise—known as a common-law compromise and a statutory composition, respectively—are discussed in this chapter. A common-law compromise is based on contract and so requires the approval of all creditors to whom it is

proposed. By contrast, a s 119 composition is a statutory mechanism under which the decision of the majority of creditors binds the dissenting minority.

From a creditor's perspective, a common-law compromise may be an attractive alternative to sequestration because not only will the creditor usually receive his dividend earlier than in a sequestration, but the dividend may also be higher because sequestration costs are saved. Often a relative of the debtor will be willing to pay in an amount of money to make the compromise attractive to creditors. And the compromise may also enable the debtor to continue with his trade, which will obviously be beneficial to creditors whose businesses depend on that of the debtor, as well as to creditors who supply goods to him. For the debtor, the obvious advantage of a common-law compromise is that he is released from his debts without having to suffer the consequences of the sequestration of his estate.

Compared to a common-law compromise, the main advantage of a statutory composition is that it does not depend on the participation of all the creditors. Once

Page 242

the required majority of creditors have approved, the dissenting minority and the absent creditors are bound. But it has the disadvantage that, unlike a common-law compromise, it cannot provide for the discharge of the sequestration order. The debtor remains an unrehabilitated insolvent, although he may apply for early rehabilitation in certain circumstances (see 18.4.5).

18.1 Common-law compromise

After a provisional order of sequestration has been granted, or even before this, the insolvent may enter into a written agreement with his creditors and the provisional trustee (if

one has been appointed) to pay certain dividends on creditors' claims, on condition that he be released from his debts and any provisional order of sequestration be discharged. A proposal envisaging the discharge of a provisional order would be directed at, and will have to be accepted by, all creditors (*De Wit v Boathavens CC (King & another intervening)* 1989 (1) SA 606 (C) 611).

An offer of compromise is often embodied in a single document with provision for signature by each creditor. If the offer is made on condition that all creditors sign it, as is invariably the case, the compromise is inchoate until all creditors have duly signed. No liability attaches to any single creditor until all have signed, and any signatory may withdraw before this point (*Kopman & another v Benjamin* 1951 (1) SA 882 (W)).

If the offer is accepted and the provisional order (if any) is discharged, the rights and duties of the various parties, including a surety, must be decided according to the terms of the deed of composition and the provisions of the common law. Should the compromise involve a sale of assets by the provisional trustee, the Master's permission must be obtained for the sale (*Harrington v Fester & others* 1980 (4) SA 424 (C)).

18.2 Offer of composition in terms of section 119

18.2.1 Submission of offer to creditors via trustee

At any time after the first meeting of creditors, the insolvent may submit a written offer of composition to the trustee (s 119(1)). If the trustee considers that the creditors will probably accept the offer, he must immediately post in a registered letter or deliver to every proved creditor a copy

of the offer with his report on it (s 119(2)). If, on the other hand, the trustee considers that there is no likelihood that creditors will accept the offer, he must inform the insolvent that the offer is unacceptable and that he does not propose to send a copy of it to creditors (s 119(3)). Then the insolvent may appeal to the Master. After considering a report from the trustee, the Master may direct the trustee to post and deliver a copy of the offer to every proved creditor (s 119(4)).

When the trustee sends or delivers copies of the offer to creditors, he must simultaneously convene, and give creditors notice of, a meeting to consider the offer and any other matter mentioned in the notice (s 119(5)). The meeting date must be not earlier than 14 days, and not later than 28 days, after the posting or delivery of the notice (s 119(6)). The meeting is a general meeting under s 41 and so must be convened as s 40 prescribes: by the publication of a notice in the *Gazette* and in one or more newspapers (*Mia v The Master & others* 1940 TPD 86 93–4; *Ilic v Parginos* 1985 (1) SA 795 (A) 803; see further 9.1.4). The notice must refer specifically to the offer of composition as a matter to be dealt with at the meeting (*ibid*).

18.2.2 Terms of composition

In general, an offer of composition may contain any terms the insolvent sees fit to incorporate in it, including terms to the effect that he should immediately be reinvested with his assets and that he should be released from further liability in respect of his debts. But the Act does set some requirements and restrictions:

- If an offer of composition provides for the giving of security, the nature of the security should be specified fully. If the security is to consist of a surety bond or

guarantee, every surety should be named (s 119(7)). This provision is merely directory and not imperative: it is conceived in the interests of creditors to ensure that they have sufficient information to make up their minds (*Blou v Lampert and Chipkin NNO & others* 1973 (1) SA 1 (A)). If the details given are insufficient, creditors may ask for further particulars or reject the offer, but the offer is not void.

- An offer of composition may not be accepted if it contains a condition entitling one creditor to obtain, as against another creditor, a benefit to which the former would not have been entitled upon the distribution of the estate in the normal way (s 119(7)). In this context, the word 'creditor' includes a creditor who has not proved a claim (s 119(8)).
- A condition which makes an offer of composition subject to the rehabilitation of the insolvent is of no effect (s 119(7)). The reason is that the court must exercise an unfettered discretion when considering an application for rehabilitation.

18.3 Acceptance of section 119 composition

To give rise to a binding composition, the offer must be accepted by creditors whose votes amount to at least three-fourths in value and three-fourths in number of the votes of all proved creditors, and payment in terms of the composition must have been made, or security for payment as specified in the composition must have been given (s 119(7)). The insolvent is then entitled to a certificate from the Master that the offer of composition has been accepted (*ibid*). In computing the creditors' vote, a secured creditor's claim is counted only in respect of the unsecured balance, if any, of his claim (s 52(5)). A creditor who has

filed his claim according to s 44 must be allowed to prove it before the offer of composition is considered. Having proved his claim, he is entitled to take part in the discussion and vote for or against acceptance (*Mia v The Master & others* 1940 TPD 86 94). The resolution to accept must be taken in good faith and in the interests of the general body of creditors. The acceptance is invalid if creditors accept an offer of compromise, not in the honest belief that the compromise is in the interests of the estate or for the benefit of creditors generally, but from feelings of pity or benevolence towards the insolvent, or with a view to benefiting him, or for some other collateral object (*Zulman & others v Schultz* 1924 TPD 24).

18.4 Consequences of section 119 composition

18.4.1 All concurrent creditors bound

An offer of composition that has been duly accepted is binding on the insolvent and all his creditors in so far as their claims are not secured or otherwise preferent (s 120(1)). The composition also encompasses and binds concurrent creditors who have not proved their claims (*Ilic v Parginos* 1985 (1) SA 795 (A) 803–4). So the basis of liability is not

Page 244

contractual, since creditors may be held bound even though they voted against acceptance or could not vote because they had not proved claims (*ibid*). The composition is best described as a statutory novation that discharges the claims of the concurrent creditors, whose rights must from then on be determined by reference to the provisions of the composition itself (*ibid*).

Although a composition affects the rights of concurrent creditors against the insolvent personally, it does not affect their rights against a surety of the insolvent (s 120(3)).

18.4.2 Restoration of property to insolvent

If it is a term of the composition that property in the insolvent estate must be restored to the insolvent, the acceptance of the composition divests the trustee of the property concerned and reverts it in the insolvent (s 120(2)). No transfer or delivery is necessary: the reversion takes place by operation of law (*Lurie NO v Mamomed* 1952 (3) SA 194 (N)). Estate assets not covered by the composition terms remain vested in the trustee (*ibid*). Assets acquired after sequestration also become the property of the insolvent if the composition terms provide for this outcome (*Ex parte Nieburg* 1929 CPD 362); if not, they vest in the trustee (*Moodley NO v Milne NO* 1965 (1) SA 154 (D) 160; cf *Ex parte Van der Merwe* 2008 (6) SA 451 (W) 457).

18.4.3 Restoration of property to solvent spouse

A composition is not binding on the creditors of the solvent spouse. Once the offer of composition is accepted, the solvent spouse's property that vested in the trustee must be restored to her (s 122). Any movable property held as security by her creditor when the property vested in the trustee must be restored to that creditor (*ibid*). The proceeds of any security that has been realized must be paid to the person or persons entitled to them, according to their rights (*ibid*).

18.4.4 Trustee to frame accounts, administer composition and report to creditors

The trustee must frame a liquidation account and a plan of distribution of the assets which are, or will become, available for distribution among the creditors under the composition (s 123(2)). The provisions of the Act relating to a liquidation account and a plan of distribution apply (*ibid*).

Any moneys to be paid and anything to be done for the benefit of creditors under the composition must be paid and done through the trustee as far as practicable (s 123(1)). But the trustee is under no duty to a creditor who fails to prove his claim before the trustee has made a final distribution among proved creditors (*ibid*). In such a case, the creditor may recover directly from the insolvent any payment to which he may be entitled under the composition (*ibid*). The creditor must exercise his right of recovery within six months from the confirmation of the account under which the distribution was made (*ibid*).

Despite the acceptance of an offer of composition, the trustee must investigate the insolvent's affairs and transactions before insolvency and report on them to creditors in the usual way (s 81(1)). The report must be submitted within one month of the acceptance of the offer (*ibid*). It is unclear why the trustee should have to report to creditors in these circumstances.

18.4.5 Right to prompt rehabilitation

As a rule, an insolvent must wait for a certain period before he may apply for his rehabilitation. But if an offer of composition has been accepted under which concurrent creditors will receive at least 50 cents in the rand, the insolvent may be entitled to apply for his rehabilitation immediately. To be so entitled, the insolvent must obtain a certificate from the Master showing that an offer of composition has been duly accepted and that payment has

been made, or that security has been given for payment, of at least 50 cents in the rand for every concurrent claim proved against the estate (s 124(1); see also 19.2.1(i)).

18.5 Illegal inducement to accept composition

It is a criminal offence for a person to accept a benefit as consideration for agreeing to, or for not opposing, a composition (s 141). An undertaking to grant a benefit to a person to induce him (or any other person) to accept an offer of composition is void. The person accepting the benefit is also liable to pay a penalty to the estate equal to the sum of

- the amount of the claim (if any) which he proved against the estate;
- the amount or value of the benefit; and
- the amount paid or to be paid to him under the composition (s 130).

The trustee may recover the penalty. If he does not do so, any creditor may proceed in his name, on indemnifying him against all costs (s 131).

Chapter 19

Rehabilitation

Synopsis

- 19.1 Automatic rehabilitation after ten years
- 19.2 Rehabilitation by court within ten years
 - 19.2.1 Circumstances in which rehabilitation may be sought
 - 19.2.2 Preliminary steps which must be taken
 - 19.2.3 Trustee's report to Master
 - 19.2.4 Application for rehabilitation
 - 19.2.5 Court's discretion
 - 19.2.6 Illegal inducement not to oppose rehabilitation
- 19.3 Effect of rehabilitation
- 19.4 Declaratory order regarding property

The insolvency of a party ends when he is rehabilitated. Rehabilitation enables the insolvent to make a fresh start, free from his pre-sequestration debts and from the restrictions placed on him by the sequestration. Rehabilitation may take place automatically, by lapse of a prescribed period of time, but the insolvent usually asks the court to rehabilitate him before the prescribed period expires. Although a person's estate is sequestrated, it is his *person* that is rehabilitated (*Acar v Pierce and other like applications* 1986 (2) SA 827 (W) 829). When an insolvent dies while his estate is under sequestration, he is not rehabilitated automatically through the passing of time, and the court cannot rehabilitate him or his deceased estate

(*Vengadesan NO v Shaik & others* 2014 (3) SA 14 (KZD) 16).

19.1 Automatic rehabilitation after ten years

An insolvent not rehabilitated by the court within a period of ten years from the date of the sequestration of his estate is deemed to be rehabilitated unless the court, on application by an interested person, orders otherwise before the ten years expire (s 127A(1)). The period runs from the date of provisional sequestration (*Grevler v Landsdown en 'n ander NNO* 1991 (3) SA 175 (T)).

If the court issues an order that an insolvent will not be automatically rehabilitated, the Registrar must send a copy of the order to every Registrar of Deeds (s 127A(2)). Each Registrar must enter a *caveat* (a warning notice) against the transfer of all immovable property, or the cancellation or cession of any bond, belonging to or registered in the insolvent's name (s 127A(3)). The *caveat* remains in force until the insolvent is rehabilitated (s 127A(4)).

Page 247

19.2 Rehabilitation by court within ten years

The Act sets out the circumstances under which rehabilitation may be sought before the ten years expire, and the procedure which must be followed to obtain a court order. But even where the provisions of the Act have been satisfied, the court is not obliged to grant rehabilitation (cf *Ex parte Woolf* 1958 (4) SA 190 (N)). The insolvent has no *right* to rehabilitation: it is a matter which rests within the discretion of the court (*Ex parte Hittersay* 1974 (4) SA 326

(SWA)). The court has to decide whether the insolvent ought to be allowed to trade with the public on the same basis as any other honest person (*Ex parte Heydenreich* 1917 TPD 657 658; *Greub v The Master & others* 1999 (1) SA 746 (C) 752–3; *Ex parte Fourie* [2008] 4 All SA 340 (D) 348–9). This decision depends on how he conducted his trade before becoming insolvent and whether he will continue in the same fashion if rehabilitated. As explained in *Ex parte Le Roux* 1996 (2) SA 419 (C) 423:

'The effect of rehabilitation of an insolvent is to restore him fully to the marketplace and, more importantly, to the obtaining of credit. The Court is accordingly as concerned with the probable future behaviour of the applicant as it is with his past.'

So, for example, if the insolvent conducted his trade negligently or to deceive others, he must convince the court that he intends to adopt better methods (*Ex parte Heydenreich (supra)*). Other factors which may influence the court in reaching its decision are mentioned below.

19.2.1 Circumstances in which rehabilitation may be sought

(i) Composition of at least 50 cents in the rand

An insolvent may immediately seek an order of rehabilitation if he has obtained a certificate from the Master that creditors have accepted an offer of composition in which payment has been made, or security has been given for payment, of at least 50 cents in the rand for every concurrent claim proved or to be proved against the estate (s 124(1)). If creditors adopt a composition providing for less than 50 cents in the rand, the insolvent may apply for rehabilitation based only on the lapse of the prescribed period (see below).

(ii) Lapse of the prescribed period after confirmation of the first account

Subject to the qualifications mentioned below, an insolvent may apply for his rehabilitation after 12 months have elapsed from the Master's confirming the first account in the estate (s 124(2)(a)):

- If the insolvent's estate has been sequestrated before, the period which must elapse before he can apply for rehabilitation is three years from the date of confirmation of the first account (s 124(2)(b)).
- If the insolvent has been convicted of a fraudulent act in relation to his insolvency (or any previous insolvency), or of an offence under ss 132, 133 or 134 of the Act, he may apply for rehabilitation only after five years have elapsed from his conviction date (s 124(2)(c)).
- The insolvent may obtain an order of rehabilitation within four years of the sequestration date only if the Master has recommended that he be rehabilitated (s 124(2) proviso). The Master's recommendation must be based on all the information available to him (*Ex parte Porritt* 1991 (3) SA 866 (N); cf *Chairperson*,

Walmer Estate Residents' Community Forum & another v City of Cape Town & others 2009 (2) SA 175 (C) 178). Refusal to recommend rehabilitation is a decision which may be reviewed under s 151 (*Greub v The Master & others* 1999 (1) SA 746 (C) 751). The court may consider the matter afresh as if it were an appeal court (*ibid*; see also 1.5).

(iii) No claims proved after six months

An insolvent may apply for his rehabilitation after a period of six months has elapsed from the sequestration date if

- at the time of making the application, no claim has been proved against his estate;

- he has not been convicted of any fraudulent act in relation to his insolvency, or of any offence under ss 132, 133 or 134 of the Act; and
- his estate has not been sequestrated before (s 124(3)).

(iv) Full payment of all proved claims

The insolvent may apply for rehabilitation at any time after the Master confirms a plan of distribution providing for full payment of all claims proved against the insolvent estate with interest calculated under the Act and all the sequestration costs (s 124(5)). The Master must have actually confirmed the required plan: it is not enough that no one has objected to the liquidation and distribution account (*Ex parte Oosthuizen* [2012] 4 All SA 408 (NWM) 411).

In *Ex parte Van Zyl* 1991 (2) SA 313 (C), it was held that if a secured creditor chose to rely only on his security under s 89(2) (see 16.1.2), and the security realized less than the full amount of his claim, he has not been paid in full for the purposes of s 124(5). In *Ex parte Oosthuizen* (*supra*) 413–14, though, Landman J pointed out that this approach is incorrect because s 124(5) refers only to *proved* claims, and if a secured creditor reduces his claim to the value of the security, then that is the amount of the claim that is proved against the estate and recognized by the trustee.

19.2.2 Preliminary steps which must be taken

(i) Notice of intention to apply

An insolvent intending to apply for his rehabilitation must give notice of his intention. The notice requirements vary according to the grounds of the application.

— *Composition:*

At least three weeks before making the application, the insolvent must give notice of his intention by advertisement in the *Gazette* and by delivering or posting by registered post a copy of that notice to the trustee (s 124(1)).

— *Lapse of prescribed period:*

The insolvent must give six weeks' notice of his intention to apply, by advertisement in the *Gazette*, and by written notice to the Master and the trustee (s 124(2)).

— *No claims proved:*

The notice requirements are the same as for the lapse of the prescribed period (s 124(3)(a)).

Page 249

— *Full payment of proved claims:*

At least three weeks before making the application, the insolvent must give notice in writing to the Master and the trustee (s 124(5)). Advertisement in the *Gazette* is unnecessary.

The three- and six-week periods must be calculated by excluding both the first and the last day (*Ex parte Douglas* 1964 (4) SA 385 (O)). The court has the power to condone short notice and will usually do so where the relevant party is the Master or the trustee, if he has had enough time to do what is required of him in terms of the Act, or has waived proper notice (*Ex parte Royston* 1948 (2) SA 1026 (W); *Ex parte Van der Merwe* 1963 (1) SA 268 (O) 271). But the court will not condone short notice in the *Gazette* (*Ex parte Van der Merwe (supra)* 271) except, perhaps, where no creditors have proved claims against the estate (cf *Ex parte Curry* 1965 (1) SA 392 (C)).

The notice published in the *Gazette* must be in the prescribed form, ie, Form 6 in the Regulations framed under

the Act, otherwise it will not be accepted by the court (*Ex parte Van Blerk* 1938 CPD 133), and it must contain the following information:

- the number of the estate;
- the full name and description of the insolvent, including his identity number, date of birth, and place of business or residence. The description of the insolvent must be sufficient to enable his creditors to identify him as the person who was their debtor at the time of sequestration. In *Ex parte Van Zyl* 1997 (2) SA 438 (E), it was held that the notice should state not only the insolvent's current place of business or residence, but also his occupation, address and trading name at the time of sequestration. Failure to do this could mislead creditors and make the notice fatally defective;
- the date of sequestration of the estate;
- the date and time of the application for rehabilitation, and the name of the court to which it will be made;
- the ground of the application (whether it is based on a composition, the lapse of the prescribed period, or the fact that no claims have been proved).

The court has the power to condone omissions and errors but will do so only if there is no prejudice to interested parties (*Ex parte Laserow* 1939 TPD 422 424; *Ex parte Minnie et Uxor* 1996 (3) SA 97 (SE)). In *Ex parte Sedeman* 1950 (2) SA 689 (C), the notice did not disclose the Division of the High Court to which application would be made. The court refused to condone the omission and ordered that the application be readvertised. Similarly, in *Ex parte Anderson* 1995 (1) SA 40 (SE), where the notice referred to a court which did not exist and gave the wrong date for the hearing of the application, the court held that the errors were fatal to the application. Conversely, in *Ex parte Minnie et Uxor* (*supra*), where the notice omitted the applicants' identity

numbers, but gave enough information—full names, dates of birth, and occupational details—to enable creditors to identify them, the court held that the omission did not invalidate the application.

(ii) Security for costs

The insolvent must provide security, to the amount or value of R500, for the payment of the costs of any opposition to the application which the insolvent may be ordered to pay (s 125). The purpose of this provision is to encourage creditors and others to place before the court facts relevant to the application (*Ex parte Schoeman* 1943 OPD

Page 250

197 199–200). The security must be furnished to the Registrar of the court at least three weeks before the hearing of the application (s 125). In *Ex parte Elliot* 1997 (4) SA 292 (W), it was held that the late furnishing of security is a fatal defect that cannot be cured by postponing the application.

19.2.3 Trustee's report to Master

Except where the reason for the application is the full payment of creditors, the trustee, on receiving the notice of intention to apply for rehabilitation, must report to the Master any facts which, in his opinion, would justify the court in refusing, postponing or qualifying the insolvent's rehabilitation (s 124(4)). The trustee is not entitled to a fee for this report (*Ex parte Thomas; Ex parte Thomas* [2002] 4 All SA 227 (T) 229–31).

19.2.4 Application for rehabilitation

(i) Form and content of application

An application for rehabilitation is brought by way of a notice of motion supported by affidavit. The founding affidavit should contain the information and averments set out below (cf s 126):

- the full name and address of the insolvent, and his present occupation;
- details of the sequestration order and of the trustee's appointment. The court to which the application is made must be the same court that granted the sequestration order (*Ex parte Garvie* 1924 OPD 108);
- the reasons for sequestration (*cf Ex parte Davis* 1938 CPD 335);
- the total of the insolvent's assets and liabilities as at the sequestration date;
- the total amount of the claims proved against the estate (or that no claim has been proved, if this is the case);
- the dividend (if any) paid to creditors;
- whether there are any further assets in the estate available for realization and, if there are, an estimate of their value;
- an allegation that the insolvent has made a complete surrender of his estate and has not granted or promised any benefit whatever to any person or entered into any secret agreement with intent to induce his trustee or any creditor not to oppose the application;
- a statement of the insolvent's assets, liabilities, and earnings as at the application date. The reason that these details are required is to enable the court to decide whether the insolvent's means are such that he should be ordered to make another payment to benefit his creditors (*Ex parte Palmer and Palmer* 1961 (1) SA 602 (W)). So the insolvent must set out the whole of the income accruing to his household, including, for example, any income received by his

- wife and dependants which would diminish the drain on his income (*ibid*). It is not enough for the insolvent to give merely an estimate of his annual earnings without details (*Ex parte De la Harpe* 1937 OPD 56);
- allegations establishing the basis on which the application is brought and the existence of the required circumstances.

— *Composition:*

The affidavit must give details of the composition, stating whether there are

Page 251

creditors whose claims have not been proved and, if there are, those creditors' names and addresses and details of their claims. The Master's certificate must be annexed to the papers.

— *Lapse of time:*

The affidavit must contain facts showing that s 124(2) does not prevent the insolvent's application. For instance, if the application is brought within three years of the confirmation of the first estate account, the affidavit must state that the insolvent's estate has not been sequestrated before and that he has not been convicted of any fraudulent act or offence mentioned in s 124(2)(c) (*Ex parte Vermaak* 1935 CPD 258). Again, if the application is made within four years from the sequestration date, the affidavit must state that the Master has recommended that the insolvent be rehabilitated. According to *Ex parte Albert* 1937 CPD 276, it is unnecessary to make any averments showing that s 124(2) does not apply, if all the periods of disability under the section have clearly long since expired.

— *No claim proved:*

The affidavit should have already mentioned that no claim has been proved (see above). It must also contain an averment that the applicant has not been convicted of any offence mentioned in s 124(2)(c) and that his estate has not been sequestrated before.

— *Payment in full:*

The affidavit must state that the Master has confirmed a plan of distribution providing for payment as required by s 124(5).

- Any details which might influence the court in granting or refusing the application. In this regard, the courts have repeatedly stressed that an application for rehabilitation is not a formality and requires a full disclosure of all relevant facts (*Ex parte Koch* 1983 (3) SA 700 (SE) 705; *Ex parte Fourie* [2008] 4 All SA 340 (D) 348). In *Greub v The Master & others* 1999 (1) SA 746 (C), the applicant sought an order setting aside the Master's refusal to recommend rehabilitation and an order for rehabilitation. The applicant did not explain or deal with various matters in his papers:
 - he mentioned that he had 'funds available' to him overseas, but did not state how much or where;
 - he did not explain the circumstances which led to the sequestration of his estate;
 - he did not state which creditors he was indebted to and what amount he owed to each; and
 - he did not deal with a list of claims annexed to his wife's statement of affairs and a schedule of creditors prepared by his trustees, other than to say that he objected to 'certain' of the latter claims and was not 'indebted to these persons in these amounts'.

The court held that as the applicant had not been frank with the court (or the Master or his trustees), his applications had to be dismissed.

- An averment that notice as required by the Act has duly been given. The relevant page of the *Gazette* should be attached to the papers (where applicable), along with the notice(s) sent out and proof of service.

Page 252

- An averment that security under s 125 has been given. Proof of this (eg, the Registrar's receipt) should be annexed to the papers.

The court will refuse to consider the affidavit if it has been attested by the insolvent's attorney or by any party who has an interest in the affidavit (*cf Ex parte Van Zyl* 1963 (2) SA 311 (GW)).

(ii) Master's report

The application papers must be served on the Master in time to enable him to report to the court on the application (s 127(1)). In practice, the Master incorporates in his report, or attaches to it, the report which he has received from the trustee (see above).

(iii) Opposition to application

The Master, the trustee, a creditor or any other person interested in the estate may oppose the granting of the application (s 127(1)). An objecting creditor, even one who purchased his claim after sequestration, need not obtain the leave of the court as an intervening party (*Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as intervening party)* [2016] 1 All SA 764 (WCC)). Opposing affidavits must be filed with the Registrar and served on the applicant, who is then allowed to deliver one or more replying affidavits.

(iv) Adjudication on application

When the application is heard, the court must have before it these documents:

- the notice of motion and supporting affidavit(s);
- the Master's certificate—where the application is based on the acceptance of a composition;
- the Master's recommendation—where the application is based on the lapse of the prescribed time and is made less than four years after the sequestration date;
- the page from the *Gazette* in which the application was advertised (where applicable) and copies of any notices sent to the Master and the trustee with proof of service;
- proof that security has been lodged with the Registrar;
- the Master's report;
- any opposing affidavit; and
- any affidavit by the insolvent in reply.

Whether the application is opposed or not, the court may refuse it or postpone it or rehabilitate the insolvent subject to any conditions it thinks fit to impose (s 127(2)).

19.2.5 Court's discretion

As mentioned above, an insolvent's rehabilitation lies solely within the court's discretion. Yet this discretion must be exercised judicially and not arbitrarily: in other words, the court must have a sound reason for arriving at its decision (*Ex parte Phillips* 1938 CPD 381 384; *Ex parte Fourie* [2008] 4 All SA 340 (D) 343). Previous cases obviously provide guidance on how the court will exercise its discretion in the future. The opinions of the Master and trustee must be properly considered. In the absence of recommendations, the court must itself examine the facts and circumstances before reaching a decision. Lapse of time on its own cannot outweigh other considerations

justifying the refusal of rehabilitation. In each case, the applicant must convince the court to exercise its discretion in his favour (*Ex parte Fourie (supra)* 343).

(i) Postponement of rehabilitation

The court may postpone the application where it requires further information for the proper exercise of its discretion (*Ex parte Isaacs* 1952 (4) SA 128 (O)) or where criminal proceedings against the insolvent are pending (*Ex parte Josselowitz* 1957 (2) SA 120 (W)). In *Ex parte Snooke* 2014 (5) SA 426 (FB), the application relied on no claim having been proved. The court postponed the application to allow late proof of claims at a special meeting. This happened because there was no proper notice of the second meeting of creditors, and the trustees' report did not provide enough information to enable creditors to assess the risk of contribution and make an informed decision whether to prove their claims (*idem* 439–40). The court may also postpone the application as a mark of its disapproval of the applicant's conduct. In *Ex parte Rupert* 1947 (1) SA 147 (C), where the applicant had made a false affidavit that she had never been insolvent, the court indicated its disapproval by postponing the application for three months. In *Ex parte Hittersay* 1974 (4) SA 326 (SWA), the insolvent had acted recklessly in his dealings with his creditors, and the insolvency was serious. To impress upon the insolvent the gravity of the matter and the need to act more responsibly towards his creditors in the future, the court postponed the application for four months. Hart J said (*idem* 328):

'[I]t should be brought home to the insolvent that rehabilitation is . . . a matter entirely in the discretion of the Court, is dependent upon his previous history and is not a right to which he is entitled.'

(ii) Grant of rehabilitation subject to a condition

The court will not impose a condition on rehabilitation unless something extraordinary justifies it (*Ex parte Meine* 1937 CPD 154). There must be special circumstances which make it just and equitable to impose the condition (*Ex parte Cutting* 1943 CPD 51), and the imposition of the condition should be properly motivated (*Ex parte Theron en 'n ander; Ex parte Smit; Ex parte Webster* 1999 (4) SA 136 (O)). An example of special circumstances would be the applicant's blameworthy conduct (before or during his insolvency), coupled with the fact that he is well able to pay any amount which may be stipulated in the condition. In *Ex parte Matthee* 1975 (3) SA 804 (O), the applicant, before insolvency, had allowed his financial affairs to deteriorate into a chaotic state. When he applied for rehabilitation, he was in permanent employment and had accumulated assets from his earnings. The court held that his rehabilitation should be granted subject to his paying the balance of the trustee's fees and the claim of the creditor who opposed the application. In *Ex parte Roos* 1955 (1) SA 572 (O), the insolvent had contravened the Insolvency Act after his estate had been sequestrated: he had failed to lodge a statement of his affairs, attend the first and second meetings of creditors, or help the trustee collect estate assets. When applying for rehabilitation, the insolvent had accumulated savings and was earning a substantial annual income. The court made his rehabilitation conditional upon his paying an increased dividend to concurrent creditors. According to *Ex parte Fowler* 1937 TPD 353 357, the court will not impose a condition that the insolvent pay unpaid claims simply because he has

managed to accumulate an estate during sequestration and is financially able to discharge the claims.

Section 127(3) provides that, among the conditions that may be attached to rehabilitation, the court may require the insolvent to consent to judgment being entered against him for the payment of the unsatisfied balance of a debt which was, or could have been, proved against his estate. Then execution cannot be issued on the judgment except with leave of the court and on proof that the insolvent has acquired property or income available for paying his debts (*ibid*). A condition often attached to rehabilitation requires the insolvent to refund the contributions paid by his creditors because his estate was deficient. For example, in *Ex parte Goshalia* 1957 (2) SA 182 (N) the court ordered that the applicant should be rehabilitated, but that his rehabilitation should be suspended until he had paid to the trustee all contributions already levied (whether paid or not) and all contributions to be levied in the future. Section 127(4) states that, in granting an application for rehabilitation in accordance with a composition, the court may order that any obligation the applicant incurred before sequestration will remain binding, despite the rehabilitation.

(iii) Refusal of rehabilitation

Examples of factors which may persuade the court to refuse an order of rehabilitation are that the insolvent conducted his business in an improper and negligent manner (*Ex parte Blumberg* 1914 EDL 1); that he failed to keep proper books of account (*Ex parte Hajee* 1939 NPD 197); that he ran up excessive debts before sequestration (*Ex parte Ezer* 1934 CPD 65); that he was difficult and refused to co-operate with the trustee in his administration of the estate (*Ex parte Martens* 1951 (4) SA 530 (N)); that he was highly obstructive in the administration of his estate and made numerous unfounded allegations against his trustees and against members of the Master's staff (*Greub v The Master & others* 1999 (1) SA 746 (C) 749); that he 'sidestepped

the inhibitions of insolvency' by living in luxury without making contributions to creditors (*Ex parte Porritt* 1991 (3) SA 866 (N)); that he failed to set out in his application for rehabilitation all the circumstances relating to his insolvency (*Ex parte Davis* 1938 CPD 335; *Greub v The Master & others* (*supra*) 751–3); that he was not entirely candid about how far he had surrendered his estate or about his conviction and sentence for criminal conduct before sequestration (*Ex parte Fourie* [2008] 4 All SA 340 (D) 343 348); and that his application disclosed nothing to suggest that he had learned the lessons of insolvency or genuinely appreciated the possible hardship his sequestration might have caused his creditors (*Ex parte Le Roux* 1996 (2) SA 419 (C)).

The court will usually not refuse rehabilitation just because there was a large excess of liabilities over assets. But the court may be influenced to refuse rehabilitation if there are other unsatisfactory features too, eg, that the insolvent incurred the debts recklessly (*Ex parte Du Toit* 1964 (3) SA 159 (T) 161).

When refusing an application for rehabilitation, the court will usually indicate some period after which the application may be renewed; but it may refrain from doing so, leaving it to the insolvent to reapply when he considers it appropriate (*Ex parte Porritt* (*supra*)).

(iv) Considerations in favour of unconditional rehabilitation

Some factors count in favour of an unconditional rehabilitation: for example, that the insolvent incurred only very small debts (*Ex parte Mark* 1932 WLD 53 56); that he was not to blame for his sequestration, which came about purely through misfortune (*Ex parte Meine* 1937 CPD 154);

that neither the creditors nor the trustee bothered to take steps under s 23(5) to obtain part of the insolvent's earnings during his insolvency (*Ex parte Jacobs* 1977 (4) SA 155 (NC)); and that the application is not opposed by creditors, the trustee or the Master (*Ex parte Van Staden* 1967 (4) SA 375 (R)).

19.2.6 Illegal inducement not to oppose rehabilitation

It is a criminal offence for a person to accept a benefit as consideration for not opposing the rehabilitation of an insolvent (s 141). An undertaking to grant a benefit to a person to induce him (or any other person) not to oppose the rehabilitation of an insolvent is void. Any person who accepts such a benefit is also liable to pay a penalty to the estate equal to the sum of

- the amount of the claim (if any) which he proved against the estate; and
- the amount or value of the benefit (s 130).

The trustee may recover the benefit. If he does not do so, a creditor may proceed in his name, as long as he indemnifies the trustee against all costs in connection with the action (s 131).

19.3 Effect of rehabilitation

Rehabilitation ends the sequestration. It relieves the insolvent of every disability resulting from sequestration. It discharges all his debts (other than those arising out of his fraud) which were due or the cause of which arose before sequestration (s 129(1)). It even discharges foreign debts reinforced by a judgment of a foreign court granted after sequestration (*North American Bank Ltd (in Liquidation) v Granit* 1998 (3) SA 557 (W) 565–7; *Ex parte Van der Merwe* 2008 (6) SA 451 (W) 458). But it does not affect the

rights, duties and powers under a composition, or the liability of a surety for the insolvent, or the liability of any person to pay a penalty or suffer a punishment under the Act (s 129(3)).

Rehabilitation does not reinvest the insolvent with his former estate (if any of it remains) except in two cases:

- if a composition provides that the estate will reinvest in the insolvent (s 120(2)); and
- if the basis of the rehabilitation was the fact that no claims were proved within six months of sequestration (s 129(2)).

Other than in these cases, property vested in the trustee before rehabilitation and which has not been distributed to creditors remains vested in the trustee for the purposes of realization and distribution (s 25(1)). But if the insolvent brings about an act of registration regarding immovable property after the expiry of every *caveat* (warning notice) entered against the property by the Registrar of Deeds, the act of registration is taken to be valid (s 25(3)). Then the trustee is limited to recovering the value of immovable property or the right to immovable property disposed of (s 25(4); and see 5.4).

19.4 Declaratory order regarding property

If the insolvent can show that neither the trustee nor his creditors laid claim to an asset in his estate (for example, an asset inherited during his insolvency), he may, on applying for rehabilitation, or even after that, ask for an order declaring that he is entitled to the asset (*Ex parte Parker* 1946 CPD 536; *Ex parte Kriel* 1949 (1) SA 971 (O) 975; *Ex parte Van der Merwe* 2008 (6) SA 451 (W) 461–2).

The court may grant the order on the basis that the trustee and creditors, by making no claim in respect of the asset, have waived whatever rights they might have had to it (*Ex parte Olivier* 1948 (2) SA 545 (C) 554).

To obtain the order, the insolvent must meet these requirements (*Ex parte Steele* 1948 (1) SA 1203 (W) 1204; *Ex parte Kriel (supra)* 976):

- He must publish a notice of his intention to apply in the *Government Gazette*. The notice must fully describe the property and how he acquired it.
- He must serve a copy of the notice on the Master, the trustee and all creditors (proved and unproved) whose claims have not been satisfied. Cf *Ex parte Oosthuizen* [2012] 4 All SA 408 (NWM) 416 in which the court postponed the application to allow the applicant, among other things, to obtain reports from the Master and all the trustees and to notify both proved and unproved creditors of the application. If the insolvent cannot trace a creditor, he must set out in his application what efforts he has made in this regard.
- In his application, he must show that the trustee and creditors have full knowledge of the facts, and he must give full information to establish that the property was acquired adversely to the trustee.

As the basis of the court's power to grant a declaratory order is that the trustee and the creditors do not lay claim to this property, it follows that if any creditor objects to the declaratory order, the insolvent is not entitled to the property and the court cannot vest it in him (*Vorster v Steyn NO en andere* 1981 (2) SA 831 (O)).

Ex parte Van der Merwe (supra) illustrates that a revesting order is possible even where the insolvent acquired the property in question *before* sequestration. The trustee had excluded the property (a vacant piece of ground) from the liquidation and distribution account

because the arrear rates and taxes owing on it exceeded its value and the municipality had been unwilling to take over the property in exchange for abandoning its claim for rates and taxes. Only one creditor had proved a claim against the estate, and a contribution had been levied against that creditor. Before bringing the application, the applicant had repaid the contribution amount along with the outstanding rates and taxes. The court granted an order revesting the property in the applicant. Moshidi J observed (*idem* 467):

'[T]he present application presents with unique and unprecedented circumstances where the insolvent acquired the immovable property prior to his sequestration. He disclosed the immovable property to his trustee. The trustee duly investigated the matter, but thereafter elected to abandon the asset and excluded same from the first and final liquidation and distribution account. . . . [E]ven though the property was acquired prior to the sequestration, the applicant has made no attempt to conceal the asset. The property in question was simply not possible to liquidate, and the only potential creditor that would have suffered because of it, the municipality, has since been paid in full. The applicant has at no time harboured the intent of depriving his creditors of any benefit due to them from his sequestrated estate; he has continuously taken the court into his confidence by revealing his

Page 257

standing with his creditors, both proved and unproved. . . . There can obviously be no prejudice to any of the applicant's creditors, as he has satisfied not only his estate's sole proven creditor, but has also taken steps to satisfy the municipality who failed to respond to the publication of his sequestrated estate.'

Part 7

Miscellaneous

Chapter 20: Partnership and sequestration

- 20.1 Voluntary surrender of partnership estate
- 20.2 Compulsory sequestration of partnership estate
- 20.3 Sequestration of partner's estate
- 20.4 Composition
- 20.5 Proof of claims
- 20.6 Separate administration of estates
- 20.7 Surplus in either estate
- 20.8 Rehabilitation
- 20.9 Offences

Chapter 21: Insolvent deceased estates

- 21.1 Determining insolvency and procedure to be followed
- 21.2 Sale of estate assets
- 21.3 Estate account
- 21.4 Distribution of estate
- 21.5 Sequestration of deceased estate

Chapter 22: Offences

- 22.1 Jurisdiction
- 22.2 Partners
- 22.3 Estate representative
- 22.4 Employees and agents
- 22.5 Evidence

22.6 Sentence
22.7 Specific offences

Chapter 20

Partnership and sequestration

Synopsis

- 20.1 Voluntary surrender of partnership estate
- 20.2 Compulsory sequestration of partnership estate
- 20.3 Sequestration of partner's estate
- 20.4 Composition
 - 20.4.1 Composition by partnership
 - 20.4.2 Composition by partner
- 20.5 Proof of claims
- 20.6 Separate administration of estates
- 20.7 Surplus in either estate
- 20.8 Rehabilitation
- 20.9 Offences

Section 2 defines a 'debtor' as including a partnership or the estate of a partnership, and other provisions in the Act treat a partnership as an entity distinct from its members. So a partnership, although not a separate juristic person in the eyes of the law, is regarded for the purposes of the Act as a separate entity with an estate which may be sequestrated like that of a natural person (*Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA) 306). If a partnership consists of a company and a natural person, the estate of the company (as distinct from those of the partnership and the natural person) must be wound up under the Companies Act 61 of 1973 (*SA Leather Co (Pty)*

Ltd v Main Clothing Manufacturers (Pty) Ltd & another 1958 (2) SA 118 (O)).

20.1 Voluntary surrender of partnership estate

As a rule, an application to surrender a partnership estate must be brought by all the partners, or their agents (s 3(2)). So in *Ex parte Bester & another* 1937 CPD 45, the court refused the surrender of a partnership estate because only one partner had signed the application. However, the following need not apply:

- a partner not residing in the Republic (or whose whereabouts are uncertain: *Ex parte Pochlmann & Kohl* 1940 WLD 109);
- a partner *en commandite* (anonymous partner);
- a special partner as defined in the Special Partnerships Limited Liability Act 24 of 1861 (Cape) or Law No 1 of 1865 (Natal) (both enactments repealed in 1976, but without retroactive effect) (s 3(2)).

Page 262

Simultaneously with an application for surrender of a partnership estate, each partner must apply for the acceptance of the surrender of his private estate, except the partners mentioned above (ss 3(2), 13). The proper procedure is to give notice of intention to surrender both the partnership and the individual estates, and to prepare separate statements of affairs for each estate (s 13). The surrender of the partnership and individual estates may be dealt with in a single application (s 13(3)).

The court will not sequester a partner's private estate along with the partnership estate (and so that partner need not apply for the voluntary surrender of his private estate)

if he gives an undertaking to pay the partnership debts within a period fixed by the court and gives security for such payment to the satisfaction of the Registrar of the court (s 13(1) proviso).

20.2 Compulsory sequestration of partnership estate

If the court sequestrates the estate of a partnership, it is bound at the same time to sequester the private estate of every member of the partnership, except the following:

- a partner not residing in the Republic;
- a partner *en commandite* (anonymous partner);
- a special partner as defined in the Special Partnerships Limited Liability Act 24 of 1861 (Cape) or Law No 1 of 1865 (Natal) (s 13(1)).

As the partnership itself never becomes an 'insolvent', the simultaneous sequestration of the partners' estates is not simply procedural, but vital (*Acar v Pierce and other like applications* 1986 (2) SA 827 (W)). In *SA Incorporated Merchants' Protection Agency Ltd v Kruger & another* 1947 (3) SA 304 (T), the court refused to sequester the private estate of a woman partner because she was married in community of property. This decision seems incorrect: the court should have sequestered the joint estate of the woman and her spouse.

As in the case of the voluntary surrender of a partnership estate, the court will not sequester the private estate of a partner if he undertakes to pay the partnership debts within a period fixed by the court and gives security for such payment to the satisfaction of the Registrar of the court (s 13(1) proviso).

When the private estate of a partner is unable fully to meet the costs of sequestration payable out of that estate,

the balance must be paid out of the partnership's assets (s 13(2)). But the converse does not apply: if there are insufficient assets in the partnership estate, the estates of the individual partners need not contribute to the costs of the sequestration of the partnership estate.

A partnership estate may be compulsorily sequestered on the grounds of an act of insolvency committed by one of the partners only if the latter acted in his capacity as partner (*Stephen Fraser (Pty) Ltd v Ramla & others* 1961 (2) SA 554 (W)). So an act of insolvency committed purely in respect of a partner's separate estate is not a ground for the compulsory sequestration of the partnership estate. A creditor who seeks to sequester a partnership estate need not establish that there is reason to believe that sequestration would be to the advantage of the estates of the individual partners—the 'debtor' envisaged by s 10(c) is the partnership alone, and all that counts is whether there is reason to believe that the partnership's own creditors will benefit from the sequestration of the partnership estate. But this does not mean that the question of advantage to creditors of the partners' private estates is irrelevant.

Page 263

Once s 10(c) is satisfied, the court must consider all the relevant results of the sequestration of the partnership estate (including the sequestration of the partners' personal estates) in deciding whether to grant an order (*Gardee v Dhanmanta Holdings & others* 1978 (1) SA 1066 (N) 1067–8).

20.3 Sequestration of partner's estate

If the estate of a person who is a partner is sequestrated, it is unnecessary for the partnership estate or the private estates of the other partners to be sequestrated. By operation of the law (*ipso iure*), the sequestration of a partner's estate terminates the partnership, which must, as a result, be wound up (*South African Loan, Mortgage & Mercantile Agency Ltd v RC Birkett* (1885) 6 NLR 77 81; *Estate of Stoltenhoff v Howard* (1907) 24 SC 693 694). It is, of course, possible for the remaining partners to form a new partnership in the place of the old one.

When a partnership is dissolved because the estate of one of the partners has been sequestrated, the partnership assets are divided among the partners in terms of the partnership contract or the common law. The insolvent partner's share of the partnership assets vests in the trustee of his insolvent estate.

20.4 Composition

20.4.1 Composition by partnership

There is some suggestion that a partnership can make a valid composition and be reinvested with its assets even though at common law it ceases to exist when its estate is sequestrated (cf *Gain NO v Parker & Son* 1933 CPD 75). The correct position is probably that a new partnership takes the place of the old one, which dissolves on the sequestration of its estate.

20.4.2 Composition by partner

When the estates of a partnership and of the individual partners are simultaneously under sequestration, the acceptance of an offer of composition does not take effect until six weeks have expired as from the date of a written notice of acceptance given by the trustee of the private

estate to the trustee of the partnership estate (s 121(1)). If the same person is the trustee in both estates, the period expires six weeks after the date of acceptance of the composition (*ibid*). A copy of the deed containing the terms of the composition must be sent with the notice (*ibid*).

At any time during the period of six weeks, the trustee of the partnership may take over the assets of the private estate if he fulfils the obligation of the insolvent partner in terms of the deed, except obligations to render any service or obligations which only the insolvent partner can perform (s 121(2)). Should the composition provide for the giving of any specific security, the Master must decide what other security the trustee of the partnership estate may give instead (*ibid*).

20.5 Proof of claims

In principle, partnership assets are applied to the payment of partnership debts, and separate estate assets are applied to the payment of separate estate debts (*Michalow NO v*

Page 264

Premier Milling Co Ltd 1960 (2) SA 59 (W) 61–4). So if the partnership and individual estates are under sequestration simultaneously, the partnership's creditors are not entitled to prove against the separate estates of the partners. Nor are the creditors of the individual estates entitled to prove against the partnership estate (s 49(1)). The failure to comply with the peremptory terms of s 49 cannot be considered a formal defect or irregularity for the purposes of s 151 (*Cassim v The Master & others* 1962 (4) SA 601 (N) 606). But the Commissioner for the South African Revenue Service may prove claims for income tax and interest against a partnership estate for amounts due by partners (s 49(2)).

20.6 Separate administration of estates

If the estates of a partnership and of a partner are under sequestration simultaneously, the administration of all the estates must be kept entirely separate from each other, and separate accounts must be framed for each estate (s 92(5)).

20.7 Surplus in either estate

If, after all the estates have been administered, a surplus remains in a partner's separate estate, the trustee in the partnership estate is entitled to this surplus for the benefit of partnership creditors (s 49(1)). Similarly, the trustee in an individual estate is entitled to the share of any surplus in the partnership estate to which the partner would have been entitled if not insolvent (*ibid*).

20.8 Rehabilitation

As the sequestration of the partnership's estate automatically terminates the partnership, a partnership estate can never be rehabilitated (s 128).

A partner whose separate estate has been sequestrated cannot apply for his rehabilitation in his capacity as a partner. But he may apply as an ordinary debtor whose estate has been sequestrated. If his creditors have been paid in full, the court will not refuse rehabilitation merely because there is a deficiency in the partnership estate or because the partnership estate has not been finalized (*Ex parte Cohen & another* 1974 (4) SA 674 (W) 675–7).

An order rehabilitating a partner's estate releases him from all liability, not only for his own private debts, but also from his liability for the partnership debts.

20.9 Offences

The liability of individual partners for offences committed by them or by the partnership is discussed in chapter 22.

Chapter 21

Insolvent deceased estates

Synopsis

- 21.1 Determining insolvency and procedure to be followed
- 21.2 Sale of estate assets
- 21.3 Estate account
 - 21.3.1 Form of account
 - 21.3.2 Time for lodging account
 - 21.3.3 Inspection of account
 - 21.3.4 Objections to account
 - 21.3.5 Confirmation of account
 - 21.3.6 Supplementary account
- 21.4 Distribution of estate
- 21.5 Sequestration of deceased estate

If a person dies insolvent, his estate may be dealt with under the Insolvency Act or under the Administration of Estates Act 66 of 1965. This chapter focuses mainly on the procedure to be followed where an insolvent deceased estate is administered under the Administration of Estates Act. References to sections are to sections of this Act.

21.1 Determining insolvency and procedure to be followed

After the expiry of the period in which creditors must lodge their claims, the executor of a deceased estate must satisfy himself as to the solvency of the estate (s 34(1)). If he finds that the estate is insolvent, he must immediately

report the estate's position to the creditors (*ibid*). This report must be in writing, and a copy must be lodged with the Master (*ibid*). In the report, the executor must state that, unless the majority in number and value of all the creditors instruct him in writing within a period specified in the notice (which must be at least 14 days) to surrender the estate under the Insolvency Act, he will start realizing the assets of the estate according to s 34(2) (*ibid*). Adopting this latter procedure initiates a *concursum creditorum* (*Ward v Barrett NO & another NO 1963 (2) SA 546 (A) 552*). It places the estate in a 'deemed state of sequestration' (*Fairleigh NO v Whitehead & another 2001 (2) SA 1197 (SCA) 1200*).

For determining the number and value of creditors:

- a creditor whose claim amounts to less than R1 000 is not reckoned in number (s 34(1)(a));
- a creditor holding movable property as security (other than a marketable security or a bill of exchange) is reckoned according to the amount by which his claim

Page 266

exceeds the value of his security (s 34(1)(b)). If called upon to do so in writing by the executor, the creditor must place a value on the security within the period the executor sets (*ibid*). If he fails to do so, he is not reckoned as a creditor for these purposes (s 34(1)(c)).

Since creditors must make a decision based on the executor's report, it should inform them about the respective merits of the two procedures. Proceeding under s 34 is usually cheaper than surrendering the estate as insolvent. Yet the proper administration of the estate may be impossible without the procedural machinery of the Insolvency Act, in particular, the power to conduct interrogations and set aside dispositions. An executor,

unlike a trustee, has power merely to administer the estate and cannot bring any action on behalf of the estate for the benefit of creditors (*Du Toit's Executor v Du Toit* 1911 CPD 713).

The executor may initially find that he cannot determine conclusively whether the estate is solvent or insolvent (for example, because some of the claims lodged are of doubtful validity). He then has two alternatives:

- He may simply advise creditors that the estate is insolvent and proceed under s 34(1). This choice will not adversely affect creditors should the estate turn out to be solvent.
- He may continue administering the estate on the basis that it is solvent and, only once the contrary is clearly established, adopt the procedure in s 34(1). This course will also not prejudice creditors, provided the executor does not pay any claims until after the estate accounts have lain for inspection (see 21.3.3). It seems clear that the procedure in s 34(1) may be embarked upon at any stage of the administration, whenever the insolvency of the estate becomes clear.

Naturally, the s 34(1) procedure does not apply if creditors reduce their claims sufficiently, or if interested parties pay in enough to make the estate solvent.

21.2 Sale of estate assets

If the executor is not directed to surrender the estate within the period set in the notice, he must sell the assets in the estate, after giving the creditors at least 14 days' written notice of the manner and conditions of the intended sale (s 34(2)). The provisions of the Insolvency Act relating to meetings of creditors and the manner of disposal of estate assets do not apply. So, for instance, the transfer of immovable property is subject to s 118 of the Local

Government: Municipal Systems Act 32 of 2000 (dealing with clearance certificates for municipal debts) and not s 89 of the Insolvency Act (*City of Johannesburg v Even Grand* 6 CC 2009 (2) SA 111 (SCA) 115–16).

A creditor may lodge an objection to the intended sale at any time before the sale of an asset (s 34(3)). If he does, he must send a copy of the objection to the Master (*ibid*). After considering the objection, any comment the executor may have made about it, and any further details which he may have called for, the Master must either order the executor to go ahead with the sale or give any other order about the sale as he thinks fit (s 34(4)).

If a creditor holding movable property as security has placed a value on his security under s 34(1)(b) (see above), the executor may within six more weeks deal with the security, with any necessary changes (*mutatis mutandis*), in the manner provided in s 83 of the Insolvency Act (s 34(6)). Under s 83 of the Insolvency Act, the executor may take

Page 267

over the security at a value agreed upon between him and the creditor or at the full amount of the creditor's claim (see 15.2.4).

21.3 Estate account

21.3.1 Form of account

The executor must draw up an account in the prescribed form, supported by vouchers, of his liquidation and distribution of the estate (s 34(7)(a)). The account must provide for the distribution of the proceeds in the order of preference prescribed under the Insolvency Act for a sequestrated estate (s 34(7)(b); see 16.3).

21.3.2 Time for lodging account

The executor must submit the account to the Master as soon as possible after the s 34(1) notice expires, but within

- six months of being granted letters of executorship (s 34(7)(a)(i)); or
- such further period as the Master may allow (s 34(7)(a)(ii)).

The Master may, when granting an extension of time for lodging the account or whenever the executor has funds in hand which, in the Master's opinion, ought to be distributed or applied towards the payment of debts, direct the executor in writing to submit to him, within a specified period, an interim account in the prescribed form, supported by vouchers (s 34(8)). The executor must set forth in an interim account all debts due to the estate and still outstanding and all property still unrealized, and the reasons why such debts or property, as the case may be, have not been collected or realized (s 34(9); s 35(3)).

21.3.3 Inspection of account

After the Master has examined the account, it must lie open at the office of the Master for at least 21 days for inspection by any person interested in the estate (s 34(9); s 35(4)). If the deceased ordinarily resided in any district other than that in which the Master's office is situated, a duplicate of the account must lie open for inspection for the same period at the office of the magistrate of the district (*ibid*; *Faure v Britz NO* 1981 (4) SA 346 (O) 351-2).

The executor must publish a notice stating when and where the account will lie open for inspection (s 34(9); s 35(5)(a)). He must publish the notice in the *Gazette* and in one or more newspapers circulating in the district in which the deceased was ordinarily resident at the time of his death (*ibid*). If the deceased resided in another district

at any time within the 12 months before his death, the executor must also publish a notice in one or more newspapers circulating in that district (*ibid*).

A magistrate must put up in a public place in his office a list showing the date on which each account lodged with him will be transmitted to the Master (s 34(9); s 35(6)). On the expiry of the period allowed for inspecting an account, the magistrate must endorse on the account a certificate that it has duly lain open for inspection and must send the account to the Master (*ibid*).

21.3.4 Objections to account

Any person interested in the estate may, at any time before the expiry of the period allowed for inspection, lodge with the Master an objection to the account in duplicate, stating reasons for the objection (s 34(9); s 35(7)). The Master must send a copy of the objection and any supporting documents to the executor (*ibid*), who must, within 14 days after receiving the objection, send two copies of his comments on the objection to the Master (s 34(9); s 35(8)).

If, after considering the objection, the executor's comments, and such further particulars as he may require, the Master thinks that the objection is well-founded or if, apart from the objection, he thinks that the account is incorrect and should be amended, he may direct the executor to amend the account or give any other direction as he thinks fit (s 34(9); s 35(9)). If the direction affects the interests of a person who has not lodged an objection and the account is amended, the amended account must be readvertised and must again lie for inspection, unless the affected person consents in writing to the account being acted upon (s 34(9); s 35(11)).

21.3.5 Confirmation of account

The Master must confirm the account if it has lain open for inspection and

- no objection has been lodged; or
- an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection and no application has been made to court to set aside the Master's decision; or
- an objection has been lodged but has been withdrawn or has not been sustained, and no application has been made to court to set aside the Master's decision (s 34(10)).

The Master's confirmation is conclusive, and the accounts cannot be reopened except with the court's permission, which cannot be granted once a dividend has been paid under the account (*ibid*).

21.3.6 Supplementary account

If, at any time after the account has been submitted to the Master, additional assets are found in the estate and the account is not amended to provide for the application or distribution of the proceeds of those assets, the executor must, in respect of those assets, submit to the Master a supplementary account in the prescribed form, supported by vouchers (s 34(7A)).

21.4 Distribution of estate

As soon as the Master has confirmed the account, the executor must pay the deceased's creditors according to the account and lodge with the Master receipts as proof of payment (s 34(11)). If any surplus remains after creditors have been paid in full, the executor must distribute it to

legatees and heirs of the deceased (*Rosenberg v Dry's Executors & others* 1911 AD 679).

If for some reason the executor cannot distribute the money according to the account, he must, within two months after the estate has become distributable under s 34(11), pay the money to the Master, who must deposit it in the Guardian's Fund on behalf of the person(s) entitled to it (s 34(12)).

21.5 Sequestration of deceased estate

Section 34 does not exclude the right of a creditor to apply for the compulsory sequestration of a deceased estate (s 34(13)). Application may be brought as soon as an executor has been appointed: the creditor need not wait for the executor to determine the solvency of the estate under s 34 (*Paarl Board of Executors v Estate Ansell* 1916 CPD 8; see also *Hassim v Mohideen* 1930 TPD 562). It seems that a creditor may apply for compulsory sequestration even though he has previously expressly consented to the executor's administering the estate under s 34 (*Lockhat Bros & Co Ltd v Joffe's Estate* 1937 EDL 2). An executor is not obliged to oppose a sequestration application on behalf of creditors, and ought to abide by the court's judgment, unless there are exceptional circumstances (*Stainer v Estate Bukes* 1933 OPD 86 92). Investors who have established a *prima facie* case to sequester a deceased estate where the deceased has allegedly operated a pyramid scheme cannot be told to wait while the executrix investigates under s 34(1). Section 34(1) does not contemplate litigation (*Pieters NO & others v Pretorious NO* [2013] ZAWCHC 14 (18 February 2013) para 52).

The creditor's application for compulsory sequestration is governed by the ordinary principles of insolvency law, at least to the extent that he must have *locus standi* to apply under s 9(1) of the Insolvency Act, and the estate must be insolvent or the executor must have committed an act of insolvency. But the third leg of the inquiry does not simply focus on whether sequestration may or will be advantageous for creditors, but whether administration of the estate would be more advantageous for creditors as a group if it takes place under the Insolvency Act rather than the Administration of Estates Act. The court has a discretion to determine this issue, and so it is inaccurate to speak of the creditor bearing an onus of proof (*Standard Bank van SA Bpk v Van Zyl NO en 'n ander* 1999 (2) SA 221 (O) 225). The court must investigate, analyse and evaluate all the relevant facts and circumstances and consider, in particular, these factors (none of which is necessarily conclusive):

- the size of the estate;
- the complexity and possible complications inherent in the administration of the estate and how far the respective Acts offer the best method of dealing with such problems;
- the competence and independence of the executor of the deceased estate;
- the costs of the respective options; and
- the wishes of the majority of the creditors and the size of the applicant's claim (*ibid*).

The court may well be reluctant to grant a sequestration order if the major creditors oppose it and the applicant's claim is relatively small. Conversely, the court may be disposed to grant an order if the powers of a trustee are clearly essential to administer the estate effectively as, for example, where the deceased, before his death, concluded many apparently impeachable transactions which can only

be investigated properly and set aside by a trustee using the full machinery of the Insolvency Act (cf *Standard Bank van SA Bpk v Van Zyl NO en 'n ander (supra)*).

Sequestration may benefit the creditors even if the estate has no further distributable assets as, for example, where s 156 of the Insolvency Act can be relied on in recovering the amount of an indemnity from an insurer directly (*Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) 83–4).

An executor of the joint estate of spouses married in community of property cannot surrender the estate without the surviving spouse's consent (*Grimbeek v The*

Master & others 1926 CPD 183). But he can admit to a creditor that the joint estate cannot meet its liabilities and, in so doing, provide the basis for an application for compulsory sequestration (*Netherlands Bank of SA Ltd v Le Roux NO & another* 1965 (1) SA 681 (T)).

There is case authority to the effect that because s 3(1) of the Insolvency Act specifically mentions the executor of a deceased estate as a person who may apply for surrender, the executor may disregard s 34 and apply for the surrender of the estate without being instructed by creditors (see, eg, *Ex parte Du Plessis NO* 1953 (4) SA 11 (T); *Ex parte Estate Benn* 1956 (4) SA 184 (C)). It is suggested that s 3(1) of the Insolvency Act merely confers *locus standi* on the executor and that he cannot institute an application for surrender if he has not satisfied s 34. When a partnership estate is surrendered, the court is bound to accept the surrender of a deceased partner's estate, even though his creditors want his estate to be administered under s 34 (*Ex parte Looney* 1938 GWL 21).

Once a sequestration order is granted, the deceased estate vests in a trustee. He must realize the assets and

distribute the proceeds among creditors according to the usual order of preference applicable in insolvency. The rights and duties of the executor must, with certain exceptions, be regarded as being in abeyance (*The Master v Omar NO 1958 (2) SA 547 (T)*). Section 21(1) of the Insolvency Act does not apply, so the estate of the surviving solvent spouse does not vest in the trustee (*Janit v Van den Heever & another NNO (No 1) 2001 (1) SA 731 (W)*; *Janit v Van den Heever & another NNO (No 2) 2001 (1) SA 1062 (W)*).

In principle, a person, and not an estate, is rehabilitated. So there is no room for rehabilitating an insolvent deceased estate. But a problem arises if the deceased estate is later found to contain a surplus. The trustee of an insolvent estate cannot distribute a surplus but must pay it into the Guardian's Fund to await the insolvent's rehabilitation (s 116 of the Insolvency Act). It would therefore seem to be necessary to apply to court for the rehabilitation of the estate and the appointment of an executor to distribute this surplus.

Chapter 22

Offences

Synopsis

- 22.1 Jurisdiction
- 22.2 Partners
- 22.3 Estate representative
- 22.4 Employees and agents
- 22.5 Evidence
 - 22.5.1 Estate records
 - 22.5.2 Certificate by Master
 - 22.5.3 Record of meeting
 - 22.5.4 Proof of liability
 - 22.5.5 Evidence given at interrogation
 - 22.5.6 Income tax returns
- 22.6 Sentence
- 22.7 Specific offences
 - 22.7.1 Offences committed by insolvent
 - 22.7.2 Offences committed by trustee
 - 22.7.3 Offences committed by any person

The Insolvency Act creates many offences. The Act also deals with matters of a general nature relating to all prosecutions brought under its provisions. These general matters are discussed first, and then an overview of the specific offences is given.

22.1 Jurisdiction

Offences under the Act can be tried by a High Court or by a magistrate's court, provided that such court otherwise has

jurisdiction (s 2 *sv* 'court'). If a court has jurisdiction to try an insolvent for an offence under the Act, because it was committed at the place where the insolvent mainly carried on business or resided when the offence was committed, then the court also has jurisdiction to try the insolvent for that offence, even though it was committed elsewhere in the Republic (s 147(1)). The word 'insolvent', for these purposes, includes a partner, a person charged with the administration of an estate, and the employee or agent of an insolvent (s 147(2)).

22.2 Partners

A person who is or was a member of a partnership and who does (or omits to do) in relation to any property or to the affairs of that partnership or of the insolvent estate of that partnership, any act which, if done (or omitted) by him in like circumstances in

Page 272

relation to his own property or affairs, or in relation to any property belonging to, or the affairs of, his insolvent estate, would have constituted an offence under the Act, is deemed to have committed that offence (s 143(1)(a); *R v Omarjee* 1955 (2) SA 546 (A)). But such liability does not affect the liability of any of his co-partners (s 143(2)).

22.3 Estate representative

A person who is or was charged with the administration of an estate and who does, or omits to do, in relation to any property or to the affairs of that estate, any act which, if done or omitted by him in like circumstances in relation to his own property or affairs, or in relation to any property belonging to, or the affairs of, his insolvent estate, would

have constituted an offence under the Act, is deemed to have committed that offence (s 143(1)(b)).

22.4 Employees and agents

An employee who has had the sole or practical control of any property of his employer and who does or omits to do in relation to that property of his employer any act which, if done or omitted by him in like circumstances in relation to his own property or affairs, or in relation to any property belonging to, or the affairs of, his insolvent estate, would have committed an offence under the Act, is deemed to have committed that offence (s 143(1)(c); *R v Omarjee* 1955 (2) SA 546 (A)). This applies not only to property of the employer, but also to the affairs of the employer in general. The section also applies to an agent in respect of the property or affairs of his principal. Also included is a former employer or principal. Such liability does not affect the liability of any other employee or agent or the liability of the employer or principal (s 143(2)).

22.5 Evidence

Some of the special rules relating to evidence set out in the Act apply to criminal prosecution only, while others apply to both criminal and civil proceedings. These rules are set out here, but it must be remembered that those applicable to civil proceedings may be relied on whether such proceedings are brought under the Act or otherwise. Such proceedings can include the setting aside of a disposition without value or an undue or voidable preference, collusive dealings, as well as any other civil proceedings.

22.5.1 Estate records

Any original document with a certificate on it or attached to it, purporting to have been signed by a person describing

himself as Master, in which he describes the nature of the document and states that it relates to a specified insolvent person or estate, is on its mere production deemed *prima facie* to be what the certificate describes it to be (s 154(2); *R v Klisser & Rosenberg* 1949 (3) SA 807 (W)). The same applies to any record certified as belonging to the person or estate.

A copy or extract similarly certified, on which the certificate describes the original document or record, is also admissible in evidence and is of the same force and effect as the original document or record would be if it bore or had attached to it the certificate of the Master (s 154(3)).

22.5.2 Certificate by Master

A certificate purporting to have been signed by a person describing himself as Master, stating that the estate of a person or a partnership mentioned therein was sequestrated on a date therein specified, or that an insolvent mentioned therein has or has not been rehabilitated, or that any person named therein has or has not complied with any particular requirement of the Act, is received as *prima facie* evidence of the facts stated therein upon its mere production by any person (s 154(4)).

22.5.3 Record of meeting

Any record purporting to be a record of any proceeding at a meeting of creditors and purporting to have been signed by a person describing himself as Master, magistrate or other presiding officer is, upon its mere production by any person, *prima facie* evidence of the proceedings recorded therein (s 68(1)). The correctness of the record may be challenged on the grounds that it does not prove what it purports to prove (*Pine Village Home Owners Association Ltd & others v*

The Master & others 2001 (2) SA 576 (SE) 580). Unless the contrary is proved, it is presumed that the meeting was duly convened and held and that all acts performed at the meeting were validly performed (s 68(2)).

22.5.4 Proof of liability

Whenever in criminal proceedings under the Act any liability incurred by an insolvent or the date or time when the liability was incurred is in issue or relevant to the issue, proof that a claim in respect of that liability has been duly admitted against the estate is sufficient evidence of the existence of the liability. Such liability is deemed to have been incurred on the date or at the time alleged in any document submitted in accordance with the Act in support of the claim. But the accused or the prosecutor may prove that no such liability, or that a lesser or greater liability, was incurred, or that it was incurred on a date or at a time other than the date or time alleged (s 146).

22.5.5 Evidence given at interrogation

The evidence of a person who was interrogated at a meeting of creditors is admissible against him in later civil proceedings or in criminal proceedings for perjury or related offences (s 65(5), s 65(2A); *Du Plessis NO v Oosthuizen en 'n ander* 1999 (2) SA 191 (O) 206; see also 13.1.6). These provisions also apply if the person made a statement, or delivered a written statement, to the trustee or his agent, and the statement was read over to him when he was called as a witness at the interrogation. For the evidence to be admissible, it must be clear that the formalities of the Act have been strictly observed (*R v Klisser & Rosenberg* 1949 (3) SA 807 (W)).

22.5.6 Income tax returns

The trustee may obtain certified copies of the insolvent's income tax returns from the Commissioner for the South African Revenue Service. On production of the returns by any person, they are admissible in evidence in any proceedings, civil or criminal, in which the insolvent estate or the insolvent is involved (s 81(2)).

22.6 Sentence

For most of the offences which can be committed only by an insolvent, imprisonment for a maximum period ranging between six months and three years, without the option of a fine, is prescribed (see ss 132, 133, 134(1), 135(1), 136, 138, 140—the last section also applies to an insolvent's spouse). But a suspended sentence can be imposed in terms of s 297 of the Criminal Procedure Act 51 of 1977 (*S v Saunders* 1984 (2) SA 102 (T)).

For some offences created by the Act, a convicted person can be sentenced to a maximum fine of R10 000 or imprisonment of up to six months without the option of a fine, but not to both (see ss 139(1), 141 and 145, read with the Adjustment of Fines Act 101 of 1991).

If a trustee fails to lodge an account or fails to pay money due to the Master or a creditor, he can be sentenced to pay a maximum fine of R500 (s 144).

22.7 Specific offences

The specific offences created by the Act are set out in ss 132 to 145 of the Act, to which the reader is referred (see Appendix 2). These offences may be committed by

- the insolvent only (ss 132–136, 137(a) and (c), 138, 140);

- the trustee (s 144);
- any person (ss 137(b) and (d), 139, 141, 142, 145).

Some offences can be committed only before sequestration, some only after sequestration, and others at any time.

22.7.1 Offences committed by insolvent

These offences may be grouped under these headings:

- concealing or destroying books or assets (s 132(a); *R v Kruger* 1956 (2) SA 201 (A));
- failure to disclose property (s 132(b));
- concealing liabilities, or pretext as to existence of assets (s 133);
- failure to keep proper books or records (s 134; *R v Greenspan* 1945 AD 474; *R v Vather & another* 1961 (1) SA 350 (A));
- giving an undue preference to a creditor (s 135(1); *R v Kruger (supra)*; *S v Ostilly & others* (2) 1977 (4) SA 738 (D));
- contracting debts recklessly (s 135(3));
- failure to give information or to deliver assets (s 136);
- obtaining credit during sequestration (s 137(a); *S v Clifford* 1976 (1) SA 695 (A));
- failure to submit a statement of affairs, trading without the necessary permission of the trustee, failure to keep a record of income earned during sequestration, failure to help the trustee collect property (s 137(c));
- failure to attend meetings or to give information (s 138);
- failure to appear to give evidence (s 140).

When an act or omission by an 'insolvent' is made an offence, that offence may include acts done or omissions made by the insolvent before the sequestration of his estate (s 2, definition of 'insolvent').

22.7.2 Offences committed by trustee

Failure by a trustee to submit an account or to pay money due to the Master or a creditor within two months from the time when the duty arose is punishable (s 144).

22.7.3 Offences committed by any person

These offences may be grouped under these headings:

- offering certain inducements (s 137(b));
 - failure to attend to give evidence, or giving false evidence (s 139);
 - acceptance of consideration for illegal acts or omissions (s 141);
 - removing or concealing property to defeat attachment (s 142);
 - obstructing the trustee (s 145; *R v Botha* 1951 (1) SA 236 (T)).
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Part 8

Winding-up and rescue of companies and close corporations

Chapter 23:

Winding-up of companies

- 23.1 Modes of winding-up and alternatives to winding-up
- 23.2 Winding-up by court
- 23.3 Voluntary winding-up
- 23.4 Consequences of winding-up
- 23.5 Meetings and proof of claims
- 23.6 The liquidator
- 23.7 Duties of liquidator
- 23.8 Powers of liquidator
- 23.9 Interrogation and inquiry
- 23.10 Impeachable transactions
- 23.11 Release of liquidator
- 23.12 Personal liability and offences
- 23.13 Staying or setting aside of winding-up proceedings
- 23.14 Dissolution and deregistration

Chapter 24:

Winding-up of close corporations

- 24.1 Voluntary winding-up
- 24.2 Winding-up by court
- 24.3 Appointment of liquidator
- 24.4 Meeting of creditors and members
- 24.5 Liquidator's report to creditors and members
- 24.6 Setting aside of payments to members

- 24.7 Misapplication of money or property
- 24.8 Composition
- 24.9 Dissolution and deregistration

Chapter 25:

The commencement of business rescue proceedings

- 25.1 The nature and purpose of business rescue proceedings
- 25.2 Substantive requirements for the commencement of business rescue proceedings
- 25.3 The commencement of business rescue proceedings

Chapter 26:

The effects of business rescue proceedings

- 26.1 General moratorium
- 26.2 Property interests
- 26.3 Employment contracts

Page 278

- 26.4 Other contracts
- 26.5 Shares and other securities
- 26.6 Directors

Chapter 27:

Conduct of business rescue proceedings

- 27.1 The business rescue practitioner
- 27.2 Investigation of affairs of company
- 27.3 Post-commencement financing
- 27.4 Rights of affected persons
- 27.5 Meetings and committees
- 27.6 The business rescue plan

Chapter 28:

Compromise with creditors

- 28.1 Proposing a compromise with creditors
- 28.2 Approval and sanctioning

28.3 Compromise of tax debts

Chapter 23

Winding-up of companies

Synopsis

- 23.1 Modes of winding-up and alternatives to winding-up
- 23.2 Winding-up by court
 - 23.2.1 Jurisdiction of court
 - 23.2.2 When company may be wound up by court
 - 23.2.3 Parties who may apply for winding-up of insolvent company
 - 23.2.4 Parties who may apply for winding-up of solvent company
 - 23.2.5 Steps prior to application
 - 23.2.6 Powers of court
- 23.3 Voluntary winding-up
 - 23.3.1 Members' voluntary winding-up and voluntary winding-up by company
 - 23.3.2 Creditors' voluntary winding-up
- 23.4 Consequences of winding-up
 - 23.4.1 Commencement of winding-up
 - 23.4.2 Directors divested of powers and control
 - 23.4.3 Subsequent unauthorized dispositions void
 - 23.4.4 Stay of proceedings
 - 23.4.5 Notice of winding-up
 - 23.4.6 Lodging of statement of affairs with Master
- 23.5 Meetings and proof of claims
 - 23.5.1 Creditors' meetings

- 23.5.2 Members' meetings
- 23.5.3 Proof of claims
- 23.6 The liquidator
 - 23.6.1 Appointment of provisional liquidator
 - 23.6.2 Appointment of liquidator
 - 23.6.3 Persons disqualified from being liquidator
 - 23.6.4 Removal of liquidator from office
- 23.7 Duties of liquidator
 - 23.7.1 General function
 - 23.7.2 Providing information
 - 23.7.3 Keeping records
 - 23.7.4 Bank account and investments
 - 23.7.5 Exposure of offences
 - 23.7.6 Report to creditors
 - 23.7.7 Liquidation and distribution account
 - 23.7.8 Distribution of the assets
- 23.8 Powers of liquidator
 - 23.8.1 Powers for which no permission is required
 - 23.8.2 Powers requiring Master's consent
 - 23.8.3 Powers requiring authority of members and creditors

Page 280

- 23.9 Interrogation and inquiry
 - 23.9.1 Interrogation
 - 23.9.2 Inquiry by Master or court
- 23.10 Impeachable transactions
- 23.11 Release of liquidator
- 23.12 Personal liability and offences
- 23.13 Staying or setting aside of winding-up proceedings
- 23.14 Dissolution and deregistration

The definition of 'debtor' in s 2 of the Insolvency Act expressly excludes a company which may be placed in liquidation under the law relating to companies (see 1.3.2),

and so the estate of such a company cannot be sequestrated. Instead, the company is wound up or liquidated.

‘Winding-up’ means, essentially, the procedure by which a company’s assets are sold, its debts are paid, and any money left over is divided among the shareholders according to their rights (or, in the case of a non-profit company, transferred to another non-profit institution). Both insolvent and solvent companies may be wound up in certain circumstances. After the process of winding-up is complete, the Companies and Intellectual Property Commission (the Commission) records that the company has been dissolved and publishes a notice to this effect. At this point, the company ceases to exist.

The winding-up of companies is regulated by the following legislative provisions:

- Sections 79 to 81 of the Companies Act 71 of 2008 (the 2008 Act). These provisions deal with the winding-up of solvent companies.
- Chapter 14 (ss 337–426) of the Companies Act 61 of 1973 (the 1973 Act). This chapter, with certain exceptions, continues to apply to the winding-up and liquidation of companies as though the 1973 Act had not been repealed (s 224(3) read with Sch 5, item 9(1) of the 2008 Act). The chapter is to remain in effect until alternative legislation adequately providing for the winding-up and liquidation of insolvent companies has been put into operation (Sch 5, item 9(4)(a) of the 2008 Act). But certain provisions (ss 343, 344, 346 and 348–353) do not apply to solvent companies except to the extent necessary to give full effect to ss 79 to 83 of the 2008 Act (Sch 5, item 9(2) of the 2008 Act).
- Various provisions of the Insolvency Act. Section 339 of the 1973 Act states that, in the winding-up of a

company unable to pay its debts, the provisions of the law relating to insolvency must, in so far as they are applicable, be applied *mutatis mutandis* (with the necessary changes) in respect of any matter not specifically provided for by the 1973 Act. Other sections of the 1973 Act make particular areas of insolvency law applicable to the winding-up of a company: see, eg, s 340 (voidable dispositions); s 342 (application of assets to costs and claims); s 366 (proof of claims); s 412 (meetings); s 416 (interrogations); and s 417 (inquiries). Some of these sections (ss 340, 416 and 417) apply only to the winding-up of a company that cannot pay its debts.

It is clear that companies as defined in the Companies Act 71 of 2008 can be liquidated under the legislative provisions mentioned above. They include companies that were

incorporated under the 2008 Act, domesticated companies (foreign companies that moved their registration to South Africa), and pre-existing companies registered or recognized under the 1973 Act (s 1 *sv* 'company'). A company that was defined as an external company under the 1973 Act (a foreign company that has a place of business in South Africa) is expressly *excluded* from the definition in s 1 of the 2008 Act. By contrast, the definition of a 'company' in s 337 of the 1973 Act expressly *includes* external companies as well as any other body corporate. So, although external companies and any other juristic persons could be wound up under the 1973 Act before it was repealed, it is uncertain whether this winding-up can still happen now that the 1973 Act applies in terms of the transitional arrangement in the 2008 Act. Item 9(1) of Sch 5 of the 2008 Act makes Chapter 14 of the 1973 Act applicable 'with respect to the winding-up and liquidation of companies under this Act',

that is, the 2008 Act. The question is whether Chapter 14 of the repealed 1973 Act applies as before or whether the transitional provision in the 2008 Act limits the scope of Chapter 14 to companies as defined in the 2008 Act. There are conflicting High Court decisions by single judges on this point, and a decision by the Supreme Court of Appeal is needed to settle the issue throughout South Africa. In *Melville v Busane & another* 2012 (1) SA 233 (ECP) 237, the court emphasized that the 1973 Act applies to the liquidation of 'companies under this [ie, the 2008] Act'. The court had to decide whether a trust could be liquidated under the 'law relating to companies' or whether the trust was a 'debtor' that should be sequestrated under the Insolvency Act (see 1.3.2 for a discussion of the definition of 'debtor' and which estates can be sequestrated). The court held that although a trust was a 'juristic person' under s 1 of the 2008 Act, it was not a 'company' as defined (*idem* 236). So the trust could not be wound up as an insolvent company under Chapter 14 of the 1973 Act (*idem* 237). The same considerations would apply if the body corporate did not have to base its status on the wide definition of a 'juristic person' in s 1 of the 2008 Act. By contrast, in *AJVH Holdings (Pty) Ltd & others v Steinhoff International Holdings NV & others*, case number 7978/2021 Western Cape Division, Cape Town (6 September 2021), the court focused on the definition of 'company' in Chapter 14 of the 1973 Act (in s 337 of that Act) and held that the court did in principle have jurisdiction to hear an application for the winding-up of an external company. If a company or body corporate cannot be wound up under the legislation on companies, its estate can be sequestrated under the Insolvency Act (see 1.3.2).

In this chapter, references to sections are to those of the 1973 Act, unless otherwise stated.

23.1 Modes of winding-up and alternatives to winding-up

A company may be wound up in either of two ways: by the court or voluntarily (s 343(1); s 79(1) of the 2008 Act).

- Winding-up by the court (sometimes called 'compulsory winding-up') is initiated by an application to court. The application is usually brought by a creditor in the case of an insolvent company, and a shareholder in the case of a solvent company.
- A voluntary winding-up is initiated by a special resolution of the shareholders (s 349; s 81(1) of the 2008 Act). The special resolution must state whether the winding-up is to be conducted by the creditors (a creditors' voluntary winding-up) or by the shareholders (referred to as a members' voluntary winding-up in the case

Page 282

of an insolvent company (s 343(2)) and a voluntary winding-up by the company in the case of a solvent company (s 81(1) of the 2008 Act).

The court may, on application by a creditor, a member, the Master or the company, convert a voluntary winding-up into a winding-up by the court (s 354(1); ss 79(3) and 81(1)(a) (ii) of the 2008 Act). When a conversion takes place, the court may confirm any of the steps already taken in the voluntary winding-up (s 354(1)).

As an alternative to being wound up, a financially distressed company may be placed in business rescue, provided there is a reasonable prospect that the company may be rescued. An application for business rescue must be preferred over a winding-up application (*Van Niekerk v Seriso 321 CC & another* [2012] ZAWCHC 63 (20 March

2012)). The court can also make a business rescue order in any proceedings for the winding-up of the company or for the enforcement of a security (s 131(7) of the 2008 Act). A business rescue application suspends liquidation proceedings pending the adjudication of the business rescue application, and, if a business rescue order is granted, until the conclusion of the business rescue (s 131(6)). An application is 'made' for these purposes when it has been issued, served on the company and the Commission, and once all affected persons have been notified of the application (*Lutchman NO & others v African Global Holdings (Pty) Ltd & others and a related matter* [2022] JOL 53093 (SCA)). The term 'liquidation proceedings' in this context is not restricted to court proceedings leading up to a winding-up order but includes the entire process of voluntary or compulsory winding-up even after a final winding-up order (*Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA) 61).

Despite the preference for business rescue, a court hearing a business rescue application may make a winding-up order when it dismisses the business rescue application (s 131(4)(b) of the 2008 Act).

A company that is not in business rescue may resort to a compromise with its creditors (s 155 of the 2008 Act). This mechanism can be used regardless of whether or not the company is being wound up.

23.2 Winding-up by court

23.2.1 Jurisdiction of court

Under s 12(1) of the 1973 Act, the court which had jurisdiction in regard to winding-up was the High Court having jurisdiction over the area in which the company had its registered office or main place of business. It followed

that if the company's registered office and main place of business were in different High Court areas, then both courts had jurisdiction (cf *Payslip Investment Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (C) 784). The 2008 Act does not expressly regulate jurisdiction over the person of a company. It has been held that the court which has jurisdiction to grant a winding-up order is the High Court having jurisdiction over the area in which the company has its registered address (*Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd intervening)* 2013 (1) SA 191 (WCC)). A company is obliged to have a registered address, and this must be the location of its office in the Republic or, if it has more than one such office, its principal place of business (s 23(3)(b) of the 2008 Act). However, in *PMG Motors Kyalami (Pty) Ltd & another v FirstRand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA) 640, the

Supreme Court of Appeal held that after liquidation, a company continues to reside at its former place of business, even if it has stopped trading, and that the court with jurisdiction over that location continues to have jurisdiction over the person of the company. The court did not pronounce on jurisdiction in a winding-up application, so it is preferable to avoid doubt by bringing an application based on the location of the registered office.

23.2.2 When company may be wound up by court

The grounds for the winding-up of a company are set out in s 344 (insolvent company) and s 81(1) of the 2008 Act (solvent company). As will be observed, these grounds overlap to some extent. Some of the grounds mentioned in

s 344 are not dealt with below because they are irrelevant or insignificant under the 2008 Act.

Whether a company may be wound up as solvent or insolvent depends solely on its commercial solvency (*Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) 525). So any commercially solvent company may be wound up under the 2008 Act, even if it is factually insolvent, and any commercially insolvent company may be wound up under the 1973 Act, even if it is factually solvent. The test for commercial solvency enquires into the company's liquid assets available to meet ongoing and expected obligations at present as well as in the immediate future (*Murray NO & others v African Global Holdings (Pty) Ltd & others* 2020 (2) SA 93 (SCA) 103–4).

When application is made for the winding-up of a solvent company on one of the grounds in s 81(1), and it appears that the company is or may be insolvent, the court, on the application of any interested person, may order that the company be wound up as an insolvent company (s 79(3) of the 2008 Act).

(i) Special resolution

The court may wind up a company (solvent or insolvent) if it has passed a special resolution to be wound up by the court (s 344(a); s 81(1)(a)(i)).

(ii) Failure to commence or continue with business

The court may wind up a company if it has not commenced its business within a year from its incorporation, or if it has suspended its business for a whole year (s 344(c)). This ground should obviously apply to both solvent and insolvent companies but, as it is not mentioned in s 81(1), it is limited to insolvent companies.

(iii) Loss of capital

The court may wind up a company if 75 per cent of its issued share capital has been lost or become useless for its business (s 344(e)). This is another example of a ground which was originally intended to apply to both solvent and insolvent companies, but which now applies only to the latter.

(iv) Inability to pay debts

The court may wind up a company if it is unable to pay its debts as described in s 345 (s 344(f)).

Under s 345, a company is deemed to be unable to pay its debts in the following cases:

- A creditor, to whom the company is indebted for at least R100 (then due), has left a

Page 284

demand for payment at the company's registered office and the company has neglected for three weeks from then onwards to pay, secure or compromise the claim to the satisfaction of the creditor (s 345(1)(a)). The requirement of delivery at the company's registered office is peremptory and must be strictly complied with (cf *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) 44). 'Pay' in this context means pay unconditionally: so the tender of a lesser sum 'in full and final settlement' is not enough to avoid liquidation (*Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) 426–7).

- A warrant of execution (or other process) issued on a judgment against the company has been returned by the sheriff with an endorsement that he did not find disposable property sufficient to satisfy the judgment, or that the disposable property he found did not, upon sale, satisfy the process (s 345(1)(b)).

- It is proved to the satisfaction of the court that the company is unable to pay its debts (s 345(1)(c)). In considering this question, the court must take into account the contingent and prospective liabilities of the company (s 345(2); for the meaning of 'contingent and prospective', see 23.2.3(ii)). The source of payment is irrelevant, so a tender to pay by someone other than the company must be taken into account in determining its ability to pay (*Helderberg Laboratories CC & others v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C) 632). The fact that the company is factually insolvent may, depending on the circumstances, indicate that it is unable to pay its debts (*Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) 933–4), but a company could also be unable to pay its debts despite being factually solvent (*The Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd* 2021 JDR 0346 (GP) 14). An admission of insolvency may be relied on even if it was made on a 'without prejudice' basis (*Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) 219).

(v) Dissolution of external company

The court may wind up an external company if it has been dissolved in the country in which it was incorporated, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs (s 344(g)). This ground relates only to an insolvent external company. It is assumed in this paragraph 23.2.2(v) that it is legally possible to wind up an external company in South Africa (see the issue explained in the introduction to this chapter 23 above).

An external company registered as such in South Africa may be liquidated as though it were an independent entity,

even if the foreign company to which it is 'related' is not liquidated or dissolved (*Sackstein NO v Proudfoot SA (Pty) Ltd* 2003 (4) SA 348 (SCA) 357). It follows that such a company may be subjected to two simultaneous and concurrent liquidation processes: one in South Africa and the other in its country of incorporation (*Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) 183; *Sackstein NO v Proudfoot SA (Pty) Ltd (ibid)*).

(vi) Just and equitable

The court may wind up a company (solvent or insolvent) if it appears that it is just and equitable that the company should be wound up (s 344(h); s 81(1)(c)(ii) and (d)(iii) of the 2008 Act). The courts do not regard the 'just and equitable' ground as some limitless

Page 285

or 'catch-all' ground for winding up a company. They generally resort to it in specific categories of cases only and are reluctant to extend its application (*Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W); see, though, *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [1999] 2 All SA 268 (W) 276–7 279–80).

The courts have held that it is just and equitable to wind up a company in the following instances:

- The main object for which the company was formed is not possible of being attained; in other words, the company's substratum has failed or disappeared (*Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd (supra)*). So, in *In re Rhenosterkop Copper Co* (1908) 18 CTR 931, the court wound up a company which had been formed to acquire and exploit certain mining rights because the land subject to the rights was

devoid of minerals. Again, in *Apco Africa (Pty) Ltd & another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA), the court wound up a company which lacked infrastructure of its own and which was unable to obtain work because of a deadlock between its shareholders. The court found that the company depended for its existence on work being referred to it by one of its corporate shareholders and that the deadlock between shareholders had resulted in the disappearance of the company's substratum.

- The company's objects are illegal, or the company was formed to defraud the persons invited to subscribe for its shares. In *Cunninghame & another v First Ready Development* 249 (Association incorporated under section 21) 2010 (5) SA 325 (SCA), the court wound up a company incorporated as an association not for gain because its real purpose was to conduct a commercial business for gain.
- There is a justifiable lack of confidence in the conduct and management of the company's affairs. For a lack of confidence to be justifiable, it must relate to the conduct of the directors in carrying on the company's affairs, not their private lives (*Loch & another v John Blackwood Ltd* [1924] AC 783 (PC)). Mere dissatisfaction at being outvoted on business matters or domestic policy issues is not enough (*ibid*). An example of a justifiable loss of confidence is provided by the case of *Moosa NO v Mavjee Bhawan (Pty) Ltd & another* 1967 (3) SA 131 (T). The sole director of a company had misled the members into believing that it would be uneconomical for the company to renovate and retain a valuable piece of property, and that the company should rather sell the property. The director had done this fraudulently, to secure the asset for himself. The court held that the members' loss of confidence in the director had been warranted and

that it was just and equitable that the company should be wound up.

- The voting power in the board of directors or in the general meeting of the company is so divided between dissenting groups that the deadlock cannot be resolved except by winding up the company (*Redler v Collier and The Cereal Manufacturing Co Ltd* 1923 CPD 458; cf *Kanakia v Ritzshelf 1004 CC t/a Passage to India & another* 2003 (2) SA 39 (D)). A deadlock in management usually arises where there are only two directors or two shareholders holding equal voting rights and they have developed irreconcilable differences. But the phenomenon is not confined to small domestic companies. The two narrowly circumscribed deadlock situations as grounds for the winding-up of solvent companies (s 81(1)(d)(i)–(ii) of the 2008 Act; see (x) below) are examples, and so the just and equitable ground in s 81(1)(d)(iii)

should not be interpreted restrictively as covering only similar circumstances (*Thunder Cats Investments 92 (Pty) Ltd & another v Nkonjane Economic Prospecting & Investment (Pty) Ltd & others* 2014 (5) SA 1 (SCA) 8). The so-called 'deadlock principle', which refers to the failure of the relationship between the parties (see immediately below), can still be invoked under s 81(1)(d)(iii) (*ibid*).

- The company is a 'quasi-partnership' and circumstances exist which would be good grounds for dissolving a partnership (*Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W); *Apco Africa (Pty) Ltd & another v Apco Worldwide Inc* (*supra*) 628–9). Some companies are founded on a personal relationship of confidence and trust much like

that existing between partners regarding the partnership business. This relationship usually requires the members to act reasonably and honestly towards each other and with friendly co-operation in running the company's affairs. If one or more of the members act contrary to the spirit of this relationship and, in so doing, effectively destroy it, the court may hold it just and equitable to wind up the company (*Moosa NO v Mavjee Bhawan (Pty) Ltd & another (supra)* 137–8). In *Ebrahimi v Westbourne Galleries Ltd & others* [1973] AC 360 (HL), E and N, who had been partners in a business, formed a company in which they were members and directors. N and his son, who together held most of the shares, later passed a resolution dismissing E as a director. The court held that the dismissal, although permitted by the articles of the company, violated the personal relationship between the parties. So it was just and equitable that the company should be wound up. (See also *Wilde & another v Wadolf Investments (Pty) Ltd & others* 2005 (1) SA 354 (W).)

- The controlling shareholders oppress the minority shareholders. But the court may refuse a winding-up order in this type of case if the oppression can be removed with some other remedy, for example, by interdicting the wrongdoers from continuing their oppression (*Mouw v Imanu-Shalom Congregation & another* 1994 (2) SA 240 (W)), or by making an order compelling the company or some of its members to buy the shares of the aggrieved minority. When the company is insolvent, alternative measures are unlikely to be considered unless they also address the company's financial situation.

(vii) Conversion of voluntary winding-up into winding-up by court

The court may wind up a solvent company that has commenced a voluntary winding-up if the company applies to have the winding-up continued by the court (s 81(1)(a)(ii) of the 2008 Act).

(viii) No reasonable prospect of business rescue succeeding

The court may wind up a solvent company that is in business rescue if the practitioner concludes that there is no reasonable prospect of the company's being rescued (s 81(1)(b)). As only solvent companies may be wound up on this ground, it is unlikely to be of much use in practice. The 1973 Act does not contain a similar ground for insolvent companies, and a business rescue practitioner cannot bring an application on any of the grounds mentioned in s 344 of that Act. A business rescue practitioner of an insolvent company who concludes that the company cannot be rescued must still rely on

Page 287

s 141(2)(a)(ii) of the 2008 Act to have the business rescue proceedings discontinued and the company placed in liquidation (*Mentz NO v Truck MEC (Pty) Ltd* 2021 JDR 0065 (GJ) 9).

(ix) Termination of business rescue proceedings

The court may wind up a solvent company that has commenced business rescue proceedings if the proceedings have ended in the manner contemplated in s 132(2)(b) or (c)(i) (filing of a notice of termination or rejection of the proposed business plan) and it appears just and equitable in the circumstances for the company to be wound up (s 81(1)(c)(i) of the 2008 Act).

(x) Deadlock in management or voting

The court may wind up a solvent company where either of the following situations exists:

- The directors are deadlocked in the management of the company, the shareholders are unable to break the deadlock, and as a result of the deadlock
 - irreparable injury to the company is resulting, or may result; or
 - the company's business cannot be conducted to the advantage of shareholders generally.
- The shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive annual general meeting dates to elect successors to directors whose terms have expired (s 81(1)(d)(i)–(ii) of the 2008 Act).

(xi) Fraud, illegality or misapplication of company assets

The court may wind up a solvent company on the grounds that

- the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or
- the company's assets are being misapplied or wasted (s 81(1)(e)(i)–(ii) of the 2008 Act).

(xii) Failure to comply with compliance notice

The court may wind up a solvent company where

- the company, its directors, prescribed officers or other persons in control of it are acting or have acted in a manner that is fraudulent or otherwise illegal; the Commission or Panel (ie, the Takeover Regulation Panel, established by s 196 (s 1 sv 'Panel')) has issued a compliance notice in respect of that conduct; and the company has failed to comply with the notice; and

- within the previous five years, enforcement procedures in terms of the 2008 Act or the Close Corporations Act 69 of 1984 were taken against the company, its directors or prescribed officers, or other persons in control of it for substantially the same conduct, resulting in an administrative fine, or conviction for an offence (s 81(1)(f)(i)–(ii) of the 2008 Act)).

23.2.3 Parties who may apply for winding-up of insolvent company

Section 346 of the 1973 Act says who may apply to court for the winding-up of an insolvent company. The onus in each case is on the applicant to establish that he has the requisite *locus standi* (legal standing) to bring the application (cf *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd & another*

Page 288

intervening) 1978 (1) SA 70 (D) 72; *Kyle & others v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T) 226).

(i) The company

The company itself may bring the application (s 346(1)(a)). There used to be a difference of opinion on whether the company must be authorized by a special resolution of members passed in a general meeting or whether the company may act on a resolution of directors. (See *Ex parte Tangent Sheeting (Pty) Ltd* 1993 (3) SA 488 (W) and *Ex parte Graaff-Reinet Rollermeule (Edms) Bpk* 2000 (4) SA 670 (E) for the view that the directors could validly resolve to apply, and *Ex parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D), *Ex parte Screen Media Ltd* 1991 (3) SA 462

(W) and *Ex parte New Seasons Auto Holdings (Pty) Ltd* 2008 (4) SA 341 (W) for the view that the board of directors could do so only if the company's articles of association conferred that power on the board.)

The 2008 Act expressly provides that directors are to manage the company's business 'and affairs' and further states that the board may exercise all the powers and perform all the functions of the company except where the Act or the company's memorandum provides otherwise (s 66(1)). This wide wording suggests that the board can determine whether the company should apply. It is submitted that requiring only a board decision is the preferable approach. Convening a meeting of members may be an expensive exercise (a cost that an impecunious company can ill afford) and, in the case of a large company, may take some time. The delay may not only harm the company and its creditors but may also work to the prejudice of the directors, who may be under a duty to end the activities of the company promptly to avoid the charge that they carried on the business of the company recklessly (see 23.12).

(ii) One or more creditors

The application may be brought by one or more creditors, including contingent or prospective creditors (s 346(1)(b)). The creditor's claim need not equal or exceed any particular amount as it must in an application for compulsory sequestration (see 3.1.1). (The requirement, in s 345(1)(a), of a liquidated claim of R100 is relevant only to proving the company's inability to pay its debts.)

A 'contingent or prospective creditor' is one with a claim against the company which will only become enforceable in the future. The expression includes, for example,

- a party who has lent money repayable on a date which has not yet arrived;

- a surety for the company (*Wilde & another v Wadolf Investments (Pty) Ltd & others* 2005 (1) SA 354 (W) 358);
- a person with a damages claim, the amount of which has not yet been quantified by the court (*Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T));
- a party to whom the company owes a recurrent periodic debt (*Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA) 233); and
- a creditor whose debt is subordinated in favour of other creditors (*Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) 218).

However, the expression does not include the claim of a preferent shareholder (*Choice Holdings Ltd & others v Yabeng Investment Holding Co Ltd* 2001 (3) SA 1350 (W) 1356–7).

(iii) One or more of its members

The application may be brought by one or more of the company's members, or by a person appointed as executor, administrator, trustee, liquidator, curator or guardian in respect of a member who is deceased, insolvent or under a disability (s 346(1)(c) and s 103(3)). But a member may not apply unless he has been registered as such in the register of members for at least six months before the date of the application, or unless the shares he holds have devolved upon him through the death of a former holder (s 346(2)). Nor may a member apply on the grounds mentioned in 23.2.2(i), (vi), and (vii) above (special resolution, inability to pay debts, dissolution of external company) (s 346(2)).

It will be observed that the members of a company have various ways of initiating the winding-up of the company:

- The members may resolve by special resolution to proceed with a members' voluntary winding-up of the company.
- The members may resolve by special resolution to proceed with a creditors' voluntary winding-up of the company.
- The members may resolve by special resolution that the company should apply to court for a winding-up order. The resolution here constitutes the substantive ground, although the motivation behind it might influence the court's decision.
- One or more members (who meet certain requirements) may apply to court for a winding-up order. The application may only be brought on some of the grounds stated in s 344. Most importantly, it cannot be founded on the company's inability to pay its debts. An application for a winding-up order on this ground can only be brought by the company itself (acting under a special resolution, or perhaps a directors' resolution), one or more creditors of the company, the Master, or a provisional or final judicial manager.

(iv) Any or all of the above parties

The application may be brought jointly by some or all of the parties mentioned above (ie, the company, creditors, and members) (s 346(1)(d)).

(v) The Master

As mentioned above (see 23.1), the Master may apply to convert a voluntary winding-up into a winding-up by the court (s 346(1)(e)). This is the only instance in which the Master may apply for the winding-up of a company. The

reason why the Master would want to convert a voluntary winding-up into a winding-up by the court is usually to make available the procedure for examination and enquiry under ss 417 and 418 (see 23.5.1). The most probable ground for winding-up on which the Master will base his application is the company's inability to pay its debts.

(vi) A provisional or final judicial manager

A provisional judicial manager may bring the application where the provisional order of judicial management is discharged (s 346(1)(f)). This provision does not preclude a creditor from applying for the winding-up of a company under judicial management

Page 290

(Confrees (Pty) Ltd v Oneanate Investments (Pty) Ltd (Snoek Wholesalers (Pty) Ltd & others intervening) 1996 (1) SA 759 (C) 762–3). A final judicial manager is obliged to apply for winding-up if it appears to him that the company which he is managing will not become a successful concern (s 433(l)). Although the judicial management provisions have been repealed by the 2008 Act, this provision remains relevant to judicial managers appointed under the 1973 Act, although it becomes increasingly unlikely that judicial management proceedings initiated before 1 May 2011 are still pending.

23.2.4 Parties who may apply for winding-up of solvent company

Section 81(1) of the 2008 Act deals with the question of who may apply for the winding-up of a solvent company on the grounds specified in that section. The list below sets out the different grounds and the person or persons entitled to apply in each instance. As will be observed, the question of

who has *locus standi* varies according to the basis of the application.

- *Special resolution*—the company.
- *Just and equitable*—the company, one or more directors, one or more shareholders, or one or more creditors (s 81(1)(d) and s 81(1)(c)(ii)).
- *Conversion of voluntary winding-up into winding-up by court*—the company (s 81(1)(a)(ii)).
- *No reasonable prospect of business rescue succeeding*—the practitioner of the company appointed during the business rescue proceedings (s 81(1)(b)).
- *Termination of business rescue proceedings*—one or more creditors (s 81(1)(c)(i)).
- *Deadlock in management or voting*—the company, one or more directors, or one or more shareholders (s 81(1)(d)).
- *Fraud, illegality or misapplication of company assets*—any shareholder (with leave of the court) (s 81(1)(e)).
- *Failure to comply with compliance notice*—the Companies and Intellectual Property Commission or Takeover Regulation Panel (s 81(1)(f)).

A shareholder may not apply to wind up the company on the basis of a deadlock in management or voting or on the ground of fraud, illegality or a misapplication of company assets unless he has been a shareholder, or he and the party from whom he acquired the shares have been shareholders continuously for at least six months immediately before the date of the application (s 81(2)).

23.2.5 Steps prior to application

Subsections (3) to (4A) of s 346 impose several requirements to be met in an application for a winding-up order. It is unclear whether these requirements apply in an application to wind up a solvent company, as s 346 applies only 'to the extent necessary to give full effect to the

provisions of Part G of Chapter 2' of the 2008 Act (Sch 5, item 9(2) of the 2008 Act). The better view would seem to be that compliance with these requirements is necessary to give full effect to ss 79 to 81 of the 2008 Act (cf s 79(2) of the 2008 Act) and so the requirements are also applicable to the winding-up of solvent companies.

(i) Security for costs

A party applying for winding-up must give sufficient security for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if none is appointed, of all fees and charges necessary for the discharge of the company from the winding-up (s 346(3)). The application must be accompanied by a certificate issued by the Master not more than ten days before the date of the application to the effect that this security has been given (*ibid*).

(ii) Master's report

Before presenting his application to the court, the applicant must serve a copy of it on the Master, who may report to the court any facts which he has ascertained which may justify postponing or dismissing the application (s 346(4)). As in the case of voluntary surrender (see 2.5.4) and compulsory sequestration see (3.2.2(v)), Western Cape *Practice Note No 5, as amended* 2000 (4) SA 135 (C) makes the filing of a Master's report a precondition to the setting down of a winding-up application.

(iii) Notification of certain interested parties

When presenting the application to court, the applicant must also furnish a copy of it to the following (s 346(4A)(a))

(i)–(iv)):

- every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the company's employees;
- the employees themselves, by affixing a copy of the notice to any notice board accessible by the applicant and the employees inside the company premises, or, if there is no such access, by affixing a copy either to the front gate of the premises or to the front door of the premises from which the company conducted any business at the time of the application;
- the South African Revenue Service; and
- the company, unless the application is made by the company, or unless the court, in its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

As regards furnishing a copy to the employees themselves (see the second bullet above), this requirement is peremptory, but the methods listed are only directory, and the applicant can make the copy available in an alternative effective method that is reasonably likely to make it accessible to employees (*EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) 534–6). The court cannot make a final winding-up order until papers have been furnished, although it could grant a provisional order and direct how the application must be furnished to employees (*idem* 537–8).

Further, the applicant must, before or at the hearing, file an affidavit by the person who furnished a copy of the application, stating how the above requirements were met (s 346(4A)(b)).

23.2.6 Powers of court

The court may not grant a winding-up order on the grounds listed in s 81(1)(e) (fraud, illegality or misapplication of company assets; see 23.2.2(xi) above) or s 81(1)(f) (failure to comply with a compliance notice; see 23.2.2(xii) above) if, before the

conclusion of the court proceedings, the director or directors implicated in that conduct have resigned or have been removed and the court concludes that the remaining directors were not materially implicated, or if one or more shareholders have applied for an order of delinquency against the director or director responsible for the misconduct and the court is satisfied that their removal would bring an end to the misconduct (s 81(3) of the 2008 Act).

The court may grant or dismiss any application for winding-up, or adjourn the hearing of the application, conditionally or unconditionally, or make any interim order or any other order it may deem just (s 347(1)). In practice, the court seldom makes a final order immediately. Instead, it makes a provisional winding-up order (provided the applicant has made out a *prima facie* case) and issues a rule *nisi* calling upon all interested parties to show cause on the return date of the rule why the court should not make an order placing the company under final liquidation. But the Act does not oblige the court to make a provisional order, and it may, if it deems it appropriate, make a final order immediately, for instance, where the issues have been fully ventilated and nothing has been suggested or put forward to indicate that further relevant facts would be forthcoming if a rule *nisi* were issued (*Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) 934–5).

The court's power to grant an application for winding-up is discretionary, irrespective of the ground on which it is sought (*SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) 373; *Kyle & others v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T) 225). When a court faces the choice between business rescue and winding-up, the former must be preferred (*Van Niekerk v Seriso 321 CC & another* [2012] ZAWCHC 63 (20 March 2012)). Although it was previously accepted that creditors have a right to a winding-up order where a company is unable to pay (see *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & others* 1993 (4) SA 436 (C)), this approach has been tempered by the availability of business rescue proceedings (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC), but see *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD)). However, winding-up is more appropriate than business rescue

- when dispositions made by the company may need to be set aside (*Engen Petroleum Ltd v Multi Waste (Pty) Ltd & others* 2012 (5) SA 596 (GSJ); *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2012 (3) SA 273 (GSJ); *Gormley v West City Precinct Properties (Pty) Ltd* 2013 JDR 1895 (WCC));
- when the company is involved in legal disputes, particularly about contracts such as leases of immovable property that a liquidator could simply terminate;
- when there is a deadlock between the shareholders; or
- when there is a lack of current financial information about the company (*FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* (*supra*)).

The court may not refuse a winding-up order just because the company has no assets or because its assets have been mortgaged to their full value (s 347(1)). And, unlike in an application for sequestration, the court need not be satisfied that winding-up will be to the advantage of the company's creditors (although the likelihood or otherwise of a dividend is obviously a key factor for the court to consider) (*Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (T) 27).

When the company disputes allegations of fact in the creditor's application, the court may make a provisional winding-up order only if it is satisfied, from all the papers filed, that the requirements for a winding-up order have been established on a balance of probabilities (*Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) 81). On the return day, the court may refer one or more disputed questions of fact to oral evidence or postpone the application pending the outcome of a trial action (*ibid*).

Usually, the court will not grant a provisional winding-up order if the company in good faith and on reasonable grounds disputes its indebtedness to the creditor (although the rule here is not entirely inflexible) (*Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) 980–2). In such a case, it does not matter that the creditor has made out a case on a balance of probabilities (*Payslip Investment Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (C) 783). The reason for refusing the order is essentially that the application amounts to an abuse of the winding-up procedure (*idem* 789; see also *Hülse-Reutter & another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998 (2) SA 208 (C) 218–20). The courts have often emphasized that the procedure for winding-up is not designed for resolving disputes over the existence or non-existence of a

debt, and that a party should not resort to the procedure as a way of pressurizing a company to pay a debt which the company genuinely disputes on reasonable grounds (*ibid*). To defeat the application, the company need not establish that it would prove or succeed with its defence; it need only allege facts in good faith which, if proved, would constitute a good defence to the claim (*ibid*; see also *Robson v Wax Works (Pty) Ltd & others* 2001 (3) SA 1117 (C) 1122). When the company's indebtedness has been established on a *prima facie* basis, the onus is on the company to convince the court that the dispute is genuine (*Afgri Operations Ltd v Hambs Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) 98). The company's failure to pursue an alleged counterclaim against the petitioning creditor could show that the dispute is fabricated (*ibid*).

When members of the company present the application, the court will not make a winding-up order if some other remedy (eg, relief under s 163 of the 2008 Act) is available to the applicants and they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy (s 347(2); *Robson v Wax Works (Pty) Ltd & others* (*supra*)). In *Theron v Phoenix Marketing (Pty) Ltd (Heyman intervening)* 1998 (4) SA 287 (W), the court refused to make a winding-up order on the just and equitable ground because the applicant shareholder had breached the terms of a shareholder agreement which obliged him to offer his shares to the other shareholders before resorting to an application for winding-up.

23.3 Voluntary winding-up

An insolvent company may be wound up voluntarily if it has adopted a special resolution to that effect (s 349) and the Commission has registered that resolution according to the formalities laid down in s 200 (ss 350(1) and 351(1); see

also *Botha NO v Van den Heever NO* 2012 JDR 1202 (GNP)). A special resolution to wind up a company must state whether the winding-up is a members' voluntary winding-up or a creditors' voluntary winding-up (*ibid*).

A solvent company may be wound up voluntarily if it has adopted a special resolution to this effect and filed it with the Commission (s 80(1)–(2) of the 2008 Act). The resolution must provide for the winding-up to be by the company, or by its creditors (s 80(1) of the 2008 Act).

23.3.1 Members' voluntary winding-up and voluntary winding-up by company

A members' voluntary winding-up and a voluntary winding-up by the company can take place only if the company is able to pay its debts in full. Before the process can proceed

- security must be furnished to the satisfaction of the Master for paying the debts of the company within 12 months from the beginning of the winding-up; or
- the Master must dispense with such security. The Master may do this only upon receiving an affidavit by the directors of the company that it has no debts and a certificate by the auditor of the company (or if the company does not have an auditor, a person meeting the requirements for appointment as auditor) that, to the best of his knowledge and belief, and according to the records of the company, it has no debts (s 350(1); s 80(3) of the 2008 Act).

A members' voluntary winding-up or a voluntary winding-up by the company may be resorted to for various reasons: for example, the purpose for which the company was formed may have been fulfilled, or the members responsible for running the company may no longer be on amicable terms.

The procedure is simpler and quicker than a winding-up by the court or a creditors' voluntary winding-up. The members control the process throughout: creditors do not prove their claims or hold meetings.

Although the notion of an insolvent company under members' voluntary winding-up may seem strange, it is still possible for a factually or commercially insolvent company to arrange security for the full payment of its debts.

The provision for voluntary winding-up by special resolution of shareholders cannot be excluded from a company's articles of association. A court will not interfere with the exercise by the requisite majority of shareholders of the right to resolve that the company be voluntarily wound up (*National Union of Leather Workers v Barnard and Perry NNO* 2001 (4) SA 1261 (LAC) 1267).

23.3.2 Creditors' voluntary winding-up

Unlike a members' voluntary winding-up or a voluntary winding-up by the company, a creditors' voluntary winding-up may be resorted to where the company is unable to pay its debts. A creditors' voluntary winding-up can be of a solvent company or an insolvent company (s 79(1)(a)(ii) of the 2008 Act; s 343(2)(a), s 351). A solvent company may wish to resort to this type of winding-up where it has debts but is unable or unwilling to furnish security for the full payment of its debts within 12 months. The procedure resembles a winding-up by the court in that meetings of creditors are held, and the liquidator is subject to the directions of the creditors who have proved claims. The procedure may aptly be described as a 'voluntary winding-up under creditors' supervision'. The directors must prepare a statement in the prescribed form of the company's affairs and lay it before the meeting convened to pass the resolution (s 363(1)). Certain criminal provisions which

apply to a winding-up by the court do not apply to a creditors' voluntary winding-up (s 425).

23.4 Consequences of winding-up

23.4.1 Commencement of winding-up

A winding-up by the court of an insolvent company is deemed to commence 'at the time of the presentation to court of the application for the winding-up' (s 348). An application for winding-up is presented to the court for these purposes when the papers are duly lodged with the Registrar of the court (*Nel & others NNO v The Master & others* 2002 (3) SA 354 (SCA) 358). The phrase 'at the time' is given its ordinary meaning: namely, at that specific point in time, rather than on the day or date in question (*Development Bank of Southern Africa Ltd v Van Rensburg & others NNO* 2002 (5) SA 425 (SCA) 431–2). If two or more applications are made, the winding-up commences as soon as any of them is lodged with the Registrar, irrespective of whether security in respect of this application was lodged first (*First National Bank Ltd v E U Civils (Pty) Ltd; First National Bank Ltd v E U Plant (Pty) Ltd; Bassett v E U Civils (Pty) Ltd; E U Holdings (Pty) Ltd v E U Plant (Pty) Ltd* 1996 (1) SA 924 (C)), and even if the final winding-up order is granted on another application (*Nel & others NNO v The Master & others* (*supra*) 354). In *Nel's* case, a provisional winding-up order brought by one creditor was discharged and immediately replaced by a final order granted at the instance of an intervening creditor. It was held that the winding-up commenced on the date when the original application was lodged with the Registrar.

A winding-up by the court of a solvent company begins when an application 'has been made' to the court on one of

the following grounds:

- the company has adopted a special resolution that it be wound up by the court;
- the company has applied to court to have its voluntary winding-up continued by the court; or
- the business rescue practitioner has applied for liquidation on the ground that there is no reasonable prospect of the company being rescued (s 81(4)(a) read with s 81(1)(a)–(b)).

In all other cases, the winding-up by the court of a solvent company begins when the court has actually made the winding-up order (s 81(4)(b)).

The voluntary winding-up of an insolvent company commences when the relevant special resolution of members is registered with the Commission in terms of s 200 (s 352(1); see also *Botha NO v Van den Heever NO* 2012 JDR 1202 (GNP)). The voluntary winding-up of a solvent company begins when the special resolution is filed with the Commission (s 80(6)).

Determining the precise time of commencement is essential because various consequences of winding-up come into effect when the winding-up commences, as opposed to when the court makes a provisional or final winding-up order.

23.4.2 Directors divested of powers and control

Winding-up, like sequestration, establishes a *concurso creditorum* (a concourse of creditors), which is aimed at ensuring that the company's property is collected and distributed among creditors in the prescribed order of preference (*Taylor and Steyn NNO v Koekemoer* 1982 (1) SA 374 (T) 377; and see 1.2). The *concurso creditorum* is established by the granting of a winding-up order, including

a provisional order (*Excellent Petroleum (Pty) Ltd (in Liquidation) v Brent Oil (Pty) Ltd* 2012 (5) SA 407 (GNP)).

The company does not lose its corporate identity (s 353(1); and see s 80(8)(a) of the 2008 Act in relation to the voluntary winding-up of a solvent company), nor does it lose title to its assets (unless so ordered: s 361(3)). But from the moment the winding-up commences, the following consequences ensue:

- The powers of directors cease, and the directors become *functus officio* (they have discharged their office) (*Attorney-General v Blumenthal* 1961 (4) SA 313 (T); s 353(2)). In a voluntary winding-up, the liquidator, creditors or members may sanction a continuance of the directors' powers, in whole or in part (s 353(2); and see s 80(8)(b)(ii) of the 2008 Act in relation to the voluntary winding-up of a solvent company).
- The company's property is deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office (s 361(1)–(2)). A company thus retains the *dominium* (ownership) of its property. Section 339 does not have the effect of applying s 20(1)(c) of the Insolvency Act, which divests an insolvent of his assets (see 5.2), to the winding-up of a company that is unable to pay its debts (*Legh v Nungu Trading 353 (Pty) Ltd & another* 2008 (2) SA 1 (SCA)).
- The company may not continue with its business, except in so far as may be necessary for its beneficial winding-up (*Letsitele Stores (Pty) Ltd v Roets & others* 1958 (2) SA 224 (T); s 353(1); and see s 80(8)(b)(i)

of the 2008 Act in relation to the voluntary winding-up of a solvent company).

23.4.3 Subsequent unauthorized dispositions void

After the winding-up of a company has commenced

- any transfer of shares of the company without the liquidator's permission is void (s 341(1)); and
- if the company is unable to pay its debts, every disposition of its property (including rights of action) not sanctioned by the court is void (s 341(2); see also *Schmidt & another NNO v Absa Bank Ltd* 2002 (6) SA 706 (W) 712–13).

Furthermore, no set-off can take place unless mutuality of the respective claims existed at the time of the winding-up (*Thorne & another NNO v The Government* 1973 (4) SA 42 (T)).

In deciding whether to sanction a disposition made after the commencement of winding-up, the court has regard to fairness and justice and the interests of the general body of creditors (*Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) 478). An exception is made only in very limited circumstances when it would not conflict with the objects of the Act (*ibid*). The court's discretion applies only to dispositions after the deemed commencement of winding-up but before a winding-up order (provisional or final) has been made (*Pride Milling Co (Pty) Ltd v Bekker NO & another* 2022 (2) SA 410 (SCA) 422).

23.4.4 Stay of proceedings

Once a winding-up order is made or a special resolution for voluntary winding-up is registered or filed, all civil proceedings (including judgments: *Richard Keay Pollock NO v North Copper Wire (Pty) Ltd* [2002] 1 All SA 244 (T) 246)

by or against the company are suspended until the appointment of a liquidator (s 359(1)(a)). (An application for the

winding-up of a company is not a civil proceeding for these purposes and may thus be proceeded with despite the registration of a resolution for voluntary winding-up: *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* 1998 (4) SA 1240 (D)). Any attachment or execution put in force against the assets of the company is void (s 359(1)(b); *The Nantai Princess: Nantai Line Co Ltd & another v Cargo Laden on the MV Nantai Princess and other vessels & others* 1997 (2) SA 580 (D)). An attachment is 'put in force' within the meaning of these words if, under a writ of execution, the sheriff of the court takes possession of the property (*Rennie NO v Registrar of Deeds & another* 1977 (2) SA 513 (C) 515; *LL Mining Corporation Ltd v Namco (Pty) Ltd (in Liquidation) & others* 2004 (3) SA 407 (C) 411–12). If a sale in execution took place before the commencement of the winding-up but has not been completed, the sheriff may not give transfer to the buyer (*Syfrets Bank Ltd & others v Sheriff of the Supreme Court, Durban Central, & another; Schoerie NO v Syfrets Bank Ltd & others* 1997 (1) SA 764 (D); *contra Shurrie v Sheriff for the Supreme Court, Wynberg, & others* 1995 (4) SA 709 (C); cf *Edkins v Registrar of Deeds, Johannesburg & others* 2012 (6) SA 278 (GSJ)).

After the appointment of the liquidator, civil proceedings against the company may continue or commence provided the litigant concerned, within four weeks of the liquidator's appointment, gives him at least three weeks' notice in writing before continuing or commencing the proceedings (s 359(2)). 'Civil proceedings' here includes execution

proceedings put in force before the commencement of the winding-up order. So, if the company's property has already been attached when the company is wound up, the creditor concerned may continue with the execution after notice to the liquidator. But he has no preferent claim in respect of the proceeds, other than for the costs of execution (*Strydom NO v MGN Construction (Pty) Ltd & another: In re Haljen (Pty) Ltd (in Liquidation)* 1983 (1) SA 799 (D)). The requirement of notice was enacted for the benefit of the liquidator alone, and so it is unnecessary for a litigant to give notice to the liquidator when the defendant is a surety for the company and not the company itself (*Nedcor Bank Ltd v Samuel & others* 2005 (2) SA 439 (W) 441).

If notice of continuance of the proceedings is not given, the proceedings are considered to have been abandoned unless the court directs otherwise (s 359(2)(b)). The court has an unfettered discretion to allow the continuation of proceedings and must have regard to the interests of the creditors, liquidators and members (*Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (in Liquidation)* 2010 (2) SA 517 (SCA)).

23.4.5 Notice of winding-up

On receipt of a winding-up order, the Master must give notice of the winding-up in the *Gazette* (s 356(1) and (2)(b)). The Registrar of the court must transmit a copy of the winding-up order to certain sheriffs and Registrars of Deeds (s 357(1) and (3)).

A copy of the winding-up order must also be served on

- any registered trade union that represents the company's employees;
- the company's employees themselves, by affixing a copy of the application to a notice board accessible to them inside the debtor's premises, or to the front gate or to the front door of the premises from which the

debtor conducted business when the application was presented;

- the South African Revenue Service; and
- the company, unless it made the application (s 346A(1)).

To serve the winding-up order, the sheriff must establish whether a registered trade union represents the company's employees and whether the employees have access to a notice board inside the company premises (s 346A(2)). When employees can no longer be found at the premises, personal notification will constitute substantial compliance with the notification requirement (*Hendricks NO & others v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC)).

An insolvent company which has passed a resolution for its voluntary winding-up (ie, by creditors or members) must, within 28 days after registration of the resolution, give notice of the voluntary winding-up in the *Gazette* and lodge a certified copy of the resolution with the Master together with the following:

- in a members' voluntary winding-up, a certified copy of any resolution passed by the company nominating a liquidator (s 356(2)(a)(i));
- in a creditors' voluntary winding-up, two certified copies of a statement (in the prescribed form) setting out the affairs of the company (s 356(2)(a)(ii)).

In a voluntary winding-up of a solvent company, the Commission must deliver a copy of the filed resolution to the Master (s 80(7) of the 2008 Act).

23.4.6 Lodging of statement of affairs with Master

When the court has made a winding-up order, the directors and officers of the company must prepare a statement in the prescribed form of the affairs of the company and lodge two certified copies with the Master within 14 days of the date of the winding-up order (or such further period as the Master or the court may allow) (s 363(2)). The Master may call upon any person who, at any time during the year before the winding-up order, had been a director or officer of the company, or had participated in the formation of the company, to prepare the statement (*ibid*). The Master must send a copy of the statement to the liquidator on his appointment (s 363(5)).

23.5 Meetings and proof of claims

23.5.1 Creditors' meetings

Creditors' meetings are held in a winding-up by the court and in a creditors' voluntary winding-up. At least two meetings must be held. The first must be called as soon as possible after the final winding-up order has been made by the court or the special resolution for a creditors' voluntary winding-up has been registered (s 364(1)). The purpose of this meeting is to allow creditors to consider the company's statement of affairs, prove claims against the company, and nominate a liquidator (*ibid*). Both the first and second meetings must be convened and held as far as possible in the same manner as meetings of creditors under the Insolvency Act (s 412(1); and see 9.1.1–9.1.2). Further meetings of creditors must be authorized by the court (s 413).

In the case of a company unable to pay its debts, directors and officers are obliged to attend the first and second meetings of creditors (s 414(1)). The Master may subpoena other persons to appear at these meetings for the

purpose of being interrogated (s 414(2)). An interrogation may be held after the first and second meetings, and even

after the confirmation of a final account (*Standard Bank of SA Ltd v The Master & others* 1999 (2) SA 257 (SCA)).

23.5.2 Members' meetings

In a winding-up by the court and a creditors' voluntary winding-up, a meeting of shareholders or members must be held. It must be called as soon as possible after the final winding-up order has been made or the special resolution has been registered or filed (s 364(1)(b)). The purpose of this meeting is to allow members to consider the company's statement of affairs and nominate a liquidator (*ibid*). If the company has already disposed of these matters in general meeting when passing a resolution to wind itself up voluntarily, no meeting need take place (*ibid*). The court may direct that further meetings of members be held (s 413). Meetings of members are held in the manner prescribed by the regulations to the Companies Act (s 364(2); s 412(1)).

23.5.3 Proof of claims

In a winding-up by the court or a creditors' voluntary winding-up, creditors must prove their claims against the company at creditors' meetings *mutatis mutandis* (with the necessary changes) in accordance with the provisions relating to the proof of claims against an insolvent estate (s 366(1)). The liquidator may apply to the Master to fix a time by which the creditors have to prove their claims to qualify for a benefit under an account lodged with the Master before the claim was proved (s 366(2)). But the general period within which claims can be proved is

governed by s 44(1) of the Insolvency Act, which also allows the Master to give leave for the late proving of a claim (*Wishart NO & others v BHP Billiton Energy Coal South Africa (Pty) Ltd & others* 2017 (4) SA 152 (SCA) 155; *Mayo NO & others v De Montlehu* 2016 (1) SA 36 (SCA)).

In a members' voluntary winding-up, creditors need not prove their claims. The liquidator simply settles all outstanding debts, realizes the assets, and submits his liquidation and distribution account to the Master.

23.6 The liquidator

23.6.1 Appointment of provisional liquidator

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered, the Master may appoint any suitable person as provisional liquidator of the company (s 368). The court has no power to usurp the function of the Master and appoint a provisional liquidator (*City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper & others* 2018 (4) SA 71 (SCA) 84). The provisional liquidator must give security to the satisfaction of the Master for the proper performance of his duties (*ibid*). He is required to hold office until the appointment of a liquidator (*ibid*). The Master may restrict the powers of a provisional liquidator (s 386(6)). But a provisional liquidator may approach the court for leave to do anything necessary for the winding up of the company (*Fourie NO v Le Roux & others* 2006 (1) SA 279 (T) 285–6).

See 8.4.1 for a discussion of the Minister's power to determine policy for the appointment of, among others, provisional liquidators (s 158(2) of the Insolvency Act), and the declaration of constitutional invalidity of the Minister's 2014 policy in *Minister*

of Justice & another v SA Restructuring and Insolvency Practitioners Association & others 2018 (5) SA 349 (CC).

23.6.2 Appointment of liquidator

The Master must appoint as liquidator(s)

- in a members' voluntary winding-up, the person (or persons) nominated in the resolution lodged with the special resolution for the winding-up of the company (s 369(1); and see 23.5.2);
- in a creditors' voluntary winding-up and a winding-up by the court, the person (or persons) nominated by the first meeting of creditors and the initial meeting of members (s 369(2)(a)). If these meetings nominate different persons, the Master must decide whether either or both persons are to be appointed (s 369(2)(b)).

The Master may decline to appoint a nominee if he was not properly nominated or is disqualified from being appointed (see below) or fails to give security in good time for the proper performance of his duties (s 370(1)).

The Master may at any time appoint a co-liquidator (s 374).

Under s 371(1) to (3), any person aggrieved by the Master's appointment or refusal to appoint a liquidator may call upon the Master to submit his reasons to the Minister, who may, after considering the Master's reasons, any reply by the aggrieved party, and all relevant documents and information, confirm or set aside the Master's decision. According to *Janse van Rensburg v The Master & others* 2004 (5) SA 173 (T), a person is 'aggrieved' for the purposes of s 371 only if his nomination of a liquidator has not been given effect to by the Master. But in *Gedult v The*

Master & others 2005 (4) SA 460 (C) 464–5, it was held that this interpretation is too narrow. What is required is a legal grievance, and if a member or creditor does not want a specific person to be appointed as a liquidator, that constitutes a legal grievance.

The remedy provided by s 371 does not apply to the appointment or non-appointment of a provisional liquidator (*Minister of Justice v FirstRand Bank Ltd & others* 2003 (6) SA 636 (SCA) 642).

23.6.3 Persons disqualified from being liquidator

The following persons are disqualified from being nominated or appointed as a liquidator (s 372(a)–(j)):

- an insolvent;
- a minor or any other person under legal disability;
- a person declared to be incapable of being appointed as a liquidator for dishonesty or abuse of his position;
- a person who has been removed from an office of trust by the court, or who has been disqualified from being a director;
- a body corporate;
- a person who has, at any time, been convicted of theft, fraud, forgery, uttering a forged instrument or perjury, and has been sentenced to imprisonment without the option of a fine or to a fine exceeding R20;

Page 301

- a person who has, by misrepresentation or reward, induced or attempted to induce any person to vote for or nominate him as liquidator, or have him appointed as liquidator;
- a person who does not reside in the Republic;

- a person who has acted as director, officer or auditor of that company at any time within the 12 months before the winding-up (but in a members' voluntary winding-up, the auditor may act as liquidator);
- an agent authorized to vote for or on behalf of a creditor at a meeting of creditors who acts or purports to act under such authority.

If business rescue proceedings of a company conclude in a winding-up order, any person who has acted as a practitioner during those proceedings may not be appointed as liquidator (s 140(4) of the 2008 Act).

23.6.4 Removal of liquidator from office

The liquidator may, on certain grounds, be removed from his office before he has completed his duties as liquidator. The Master may remove the liquidator if

- the liquidator was not qualified for nomination or appointment, or has become disqualified, or if his nomination or appointment was for any other reason illegal;
- the liquidator has not performed his duties satisfactorily;
- the liquidator's estate has become insolvent, or he has become mentally or physically incapable of acting as liquidator;
- the majority in number and value of the creditors or, in a members' voluntary winding-up, the majority of the members, has requested the Master in writing to remove the liquidator;
- in the opinion of the Master, the liquidator is no longer suitable to be the liquidator of that company (s 379(1)(a)–(e)).

If the Master does not remove the liquidator, the court may, in any of the above circumstances or for any other good cause, remove the liquidator on application by the Master or

any other interested person (s 379(2)). The court will hold that good cause exists only if it is satisfied that removing the liquidator will be to the general advantage and benefit of all persons interested in the winding-up of the company (*Ma-Afrika Groepbelange (Pty) Ltd & another v Millman and Powell NNO & another* 1997 (1) SA 547 (C) 566). In this regard, the court will take into account, among other things, the impact that the removal will have on the liquidator's professional standing and reputation (*Hudson & others NNO v Wilkins NO & others* 2003 (6) SA 234 (T) 239) and the expense, disruption and inconvenience of employing a new liquidator to complete the work (*Ma-Afrika Groepbelange (Pty) Ltd & another v Millman and Powell NNO & another* (*supra*)).

23.7 Duties of liquidator

23.7.1 General function

The liquidator's primary duty, in any winding-up, is immediately to take possession of all the movable and immovable property of the company, to realize this property in the prescribed manner, to apply the proceeds towards paying the costs of the winding-up and the claims of creditors, and to distribute any balance among the members (s 391).

Page 302

This statutory duty overrides whatever mandate the liquidator may have received from a particular creditor and whatever agreement the liquidator may have concluded on the company's behalf (*Commissioner, South African Revenue Service v Stand Two Nine Nought Wynberg (Pty) Ltd & others* 2005 (5) SA 583 (SCA) 587).

In a winding-up by the court and a creditors' voluntary winding-up, the liquidator must, when administering the assets of the company, have regard to any directions given by a resolution of the creditors or members (s 387(1); s 351(2)). If creditors and members give no directions or conflicting ones, the liquidator may seek directions from the Master and, if he fails to give any, from the court (s 387(2) and (3)).

The liquidator of a company stands in a fiduciary relationship to the company, to the body of its members as a whole, and to the body of its creditors as a whole. He must not only be detached, independent, impartial and even-handed in his dealings with the parties interested in the winding-up, but he must also be seen to be so. It follows that he may be removed from office under s 379(2) if he loses his independence or sides with one party or faction in a dispute about the winding-up, or manifests hostility to an interested party (*James v Magistrate, Wynberg & others* 1995 (1) SA 1 (C) 14). And the same applies if, through some relationship, direct or indirect, with the company or its management or some other person concerned in its affairs, he is in a position of actual or apparent conflict of interest (*Ma-Afrika Groepbelange (Pty) Ltd & another v Millman and Powell NNO & another* 1997 (1) SA 547 (C); *Hudson & others NNO v Wilkins NO & others* 2003 (6) SA 234 (T) 240–1). In *Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA), one of the two joint liquidators of a company had also been appointed as a liquidator of that company's holding company and other companies in the same corporate group (a practice often resorted to in group insolvencies). The court found that the liquidators had lost the required objectivity and had improperly failed to dispute a large claim proven by the holding company. The

liquidators were removed for having breached their fiduciary duties.

Joint liquidators must act jointly in carrying out the required tasks. So, for example, a search warrant obtained by only one of them is invalid (*Powell & another v Leech & another; Leech & others v Powell & others* [1997] 4 All SA 106 (W)).

23.7.2 Providing information

The liquidator must give the Master such information and allow him such access to the books and documents of the company as enable him to perform his duties under the Act (s 392).

23.7.3 Keeping records

The liquidator must keep records of all money, goods, books, accounts and other documents received by him on behalf of the company (s 393(1)). The Master and any creditor may inspect these records (s 393(2)–(3)).

23.7.4 Bank account and investments

The liquidator must open a current account in the name of the company with a bank and must deposit in it all moneys which he receives for the company (s 394(1)). He may also open a savings account and deposit in it moneys not immediately required for paying the company's debts (*ibid*).

Page 303

23.7.5 Exposure of offences

The liquidator must examine the affairs and transactions of the company before its winding-up in order to ascertain whether any of the present or former directors and officers of the company have contravened or appear to have

contravened any provision of the Act or have committed any other offence (s 400(1)). At the same time, he must establish whether there are any grounds for an application to court under s 219 for the disqualification of any director from office (*ibid*). He must submit a full report to the Master before lodging his final account (s 400(2)). This report is then forwarded to the Director of Public Prosecutions, if necessary (s 400(3)). If there are grounds for an order disqualifying a director from taking part in the management of any company, that application is brought by the Director of Public Prosecutions (s 401).

23.7.6 Report to creditors

Except in a members' voluntary winding-up, a liquidator must, not later than three months after his appointment, submit a report to a general meeting of creditors (s 402). The Master may grant an extension of time for submitting the report (*ibid*). The report must deal with the following (s 402(a)–(i)):

- the issued capital of the company and the estimated amount of its assets and liabilities;
- the causes of the company's failure, if it has failed;
- whether the liquidator has submitted, or intends to submit, to the Master a report about contraventions by any of the directors;
- whether any present or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in the Act;
- any legal proceedings by or against the company which may have been pending at the date of the commencement of winding-up or which may have been or may be instituted;
- whether further inquiry is, in the liquidator's opinion, desirable in regard to any matter relating to the

- promotion, formation or failure of the company or the conduct of its business;
- whether the company has kept the accounting records required by the Act, and, if not, in what respects these requirements have not been met;
- the progress and prospects of the winding-up; and
- any other matter which the liquidator may think fit, or regarding which he may desire the directions of the creditors.

23.7.7 Liquidation and distribution account

(i) Preparation and lodging

Within six months of his appointment, a liquidator must prepare and lodge with the Master a liquidation and distribution account or, if necessary, a liquidation and contribution account (s 403(1)). The Master may grant the liquidator an extension of time for lodging the account (s 404). The account should follow the form adopted for an insolvent estate (on which, see chapter 17). The proceeds of the company's assets must be applied in paying the costs, charges and expenses incurred in the winding-up and the

Page 304

claims of creditors as nearly as possible as they would be applied under the law of insolvency (s 342).

(ii) Inspection

The account must lie for inspection at:

- the Master's office;
- the office of the magistrate of the district where the registered office of the company is located (if there is no Master's office in this district); and

- the office of the magistrate of any other district in which the company carried on business (s 406(1)).

The account must be available for inspection for whatever period the Master determines, but not less than 14 days (s 406(1)). Any person having an interest in the company may inspect the account and lodge a motivated objection to it (s 407(1)). The Master may either reject the objection, or sustain it and direct the liquidator to amend the account (s 407(2)). Any person aggrieved by the Master's decision may, within 14 days after that decision, apply to the High Court that ordered the winding-up of the company to have the Master's decision set aside (s 407(4); *Tongaat Paper Co (Pty) Ltd v The Master & others* 2011 (2) SA 17 (KZP)). In *Van Zyl NO v The Master* 2000 (3) SA 602 (C) 607, it was held that, as the Master is the official whom the legislature has entrusted with administering all estates, including companies in liquidation, his rulings ordinarily deserve some deference. So, in exercising its powers under s 407(4), the court will be reluctant to interfere with the Master's ruling and substitute its opinion for his, and will do so only if new facts have been placed before it, or the ruling in question is clearly tainted by irregularity or error. A person cannot bypass s 407(4) and approach the court directly to expunge a claim (*Wishart NO & others v BHP Billiton Energy Coal South Africa (Pty) Ltd & others* 2017 (4) SA 152 (SCA) 159).

(iii) Confirmation of the account

After the account has lain open for inspection and any objections have been disposed of, the Master must confirm the account. The confirmed account has the status of a final judgment (s 408).

23.7.8 Distribution of the assets

Once the account has been confirmed, the liquidator must distribute the estate or collect contributions in accordance with the account (s 409). Unless the memorandum or articles provide otherwise, any assets remaining after paying costs and creditors must be distributed among the members according to their rights and interests in the company (s 342).

23.8 Powers of liquidator

To perform his duties, a liquidator is vested with various powers. Some of these he may exercise only if he has the consent of the Master or the authority of creditors and members.

The liquidator may also obtain leave from the court to raise money on the security of the company's assets or to do any other thing which the court may consider necessary for winding up the company and distributing its assets (s 386(5)). If a provisional

Page 305

liquidator applies for leave, the court need not consider the probability of a final order being granted but should determine whether the powers sought are necessary for the proper exercise of the liquidator's fiduciary mandate (*Moodliar NO & others v Hendricks NO & others* 2011 (2) SA 199 (WCC) 212).

23.8.1 Powers for which no permission is required

A liquidator may, by virtue of his office, do any of the following (s 386(1)(a)–(d)):

- execute in the name of the company any deed, receipt or other document, using the company's seal;

- prove a claim in the estate of any debtor of the company and receive payment in full or of any dividend;
- draw, accept, make and endorse any bill of exchange or promissory note on behalf of the company;
- summon a general meeting of the company, or of creditors, in order to obtain authority in regard to any matter he considers necessary.

The liquidator also has automatic authority, subject to certain limitations, to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors (s 386(1)(e)).

23.8.2 Powers requiring Master's consent

A liquidator may perform the following acts if he has the Master's consent or authority:

- He may, at any time before convening the general meeting referred to above, terminate any lease under which the company has hired movable or immovable property (s 386(2)).
- He may, at any time before convening the general meeting referred to above, sell any movable or immovable property of the company (s 386(2A) and (2B)). He must make a prior written recommendation to the Master stating the reasons why an immediate sale is necessary (*ibid*). The Master may not give authority unless any holder of any preferential right over the property consents to the sale (*ibid*). A court cannot usurp the power which this section affords the Master by purporting to authorize, in its provisional order, a (still to be appointed) provisional liquidator to sell property of the company (*Turnover Holdings (Pty) Ltd v Saphi (Pty) Ltd* 1997 (1) SA 263 (T)).

- He may take urgent legal proceedings for the recovery of outstanding accounts (s 386(4)(a)).

23.8.3 Powers requiring authority of members and creditors

Most of the powers of the liquidator may be exercised only with the authority of creditors or members (or both). In a winding-up by the court, the authority must be granted by meetings of members and creditors (s 386(3)). In a members' voluntary winding-up, the authority must ordinarily emanate from a meeting of members, and in a creditors' voluntary winding-up, from a meeting of creditors (*ibid*). But it has been held that a liquidator in a voluntary winding-up may, under s 386(5) read with s 388(1), approach the court for leave to exercise a power without first having approached the

Page 306

members or creditors to obtain their authority (*Gainsford & others NNO v Hiab AB* 2000 (3) SA 635 (W)).

The powers which require authority are as follows (s 386(4)(a)–(i)):

- to institute or defend legal proceedings generally;
- to compromise debts due to the company, or to accept part payment by a debtor in settlement of his debt to the company;
- to compromise or admit any claim or demand against the company, including an unliquidated claim;
- to make an arrangement with creditors, except if the company is unable to pay its debts;
- to submit disputes to arbitration;
- to carry on or discontinue any part of the business of the company in so far as may be necessary for its beneficial winding-up;

- to enforce or abandon uncompleted contracts for the acquisition of immovable property (where the company is unable to pay its debts);
- to terminate contracts of lease;
- to sell any movable and immovable property of the company by public auction, public tender or private contract, and to deliver the property; and
- to perform any act or exercise any power for which the Act does not expressly require him to obtain the leave of the court.

As regards instituting or defending legal proceedings (the first bullet in the list above), urgent legal proceedings for the recovery of outstanding accounts may be authorized by the Master. Proceedings may be instituted in the name of the company or the liquidators in their official capacity (*Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) 474).

As regards the sale of the company's property (the penultimate bullet in the list above), although the authority of creditors as well as members is required, the court can validate an unauthorized sale to an innocent third party in terms of s 82(8) of the Insolvency Act (*Chater Developments (Pty) Ltd (in Liquidation) v Waterkloof Marina Estates (Pty) Ltd & another* 2015 (5) SA 138 (SCA) 145). Company liquidators may also rely on s 69 of the Insolvency Act regarding a search warrant when discharging their obligations to ensure that goods belonging to the insolvent estate are found, secured and liquidated according to the provisions of the Insolvency Act and/or the Companies Act 61 of 1973 for the benefit of the creditors of the insolvent estate (*Liezel Venter NO & another v Alba Skrynwerkersgeboue (Pty) Ltd* [2022] ZANCHC 38 (22 July 2022) para 21; *De Beer v Hamman NO & others* 2005 JDR 0854 (T) para 33; see 11.1).

23.9 Interrogation and inquiry

23.9.1 Interrogation

At any meeting of creditors of a company that is being wound up and is unable to pay its debts, the Master, presiding officer, liquidator and any creditor who has proved a claim may interrogate any director or subpoenaed person about the company, its business or affairs, and its property (s 415(1)). In principle, an examinee is not entitled to refuse to answer a question on the ground that the answer would tend to incriminate him (s 415(3)). But if an examinee does refuse to answer on this ground, the Master or

Page 307

presiding officer may compel him to answer only if the Master has consulted with the Director of Public Prosecutions having jurisdiction (*ibid*). Incriminating evidence obtained at or derived directly from an interrogation is not admissible in criminal proceedings against the examinee or the company of which he was an officer, other than proceedings for perjury and related offences (s 415(5)).

23.9.2 Inquiry by Master or court

In the winding-up of a company unable to pay its debts, the Master or the court may, at any time after the winding-up order has been made, hold an inquiry, or appoint a commissioner to hold an inquiry, into the trade, dealings, affairs or property of the company (ss 417 and 418). The Master's decision to hold an inquiry is reviewable under s 151 of the Insolvency Act, but it is not an administrative action and so it is not subject to review under the Promotion of Administrative Justice Act 3 of 2000 (*Nedbank*

Ltd v Master of the High Court, Witwatersrand Local Division, & others 2009 (3) SA 403 (W) 412 416).

The parties who may be summoned to appear are any director or officer of the company or any person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person deemed capable of giving information concerning the trade, dealings, affairs or property of the company (s 417(1)). The Master must apply his mind when requested to summon persons other than directors or officers and should not rubber-stamp requests by liquidators and attorneys for creditors (*Mantis Investment Holdings (Pty) Ltd v Eastern Cape Development Corporation & others* 2018 (4) SA 439 (SCA) 441–2).

The presiding officer at the inquiry is bound to act in accordance with the precepts of natural justice, which enjoin him to apply procedural fairness and even-handed impartiality to all persons who might be adversely affected by his actions (*Absa Bank Ltd v Hoberman & others NNO* 1998 (2) SA 781 (C) 796; *Leech & others v Farber NO & others* 2000 (2) SA 444 (W) 449–50; *Mitchell & another v Hodes & others NNO* 2003 (3) SA 176 (C) 187–8). In particular, the presiding officer must see to it that the inquiry is not conducted in an oppressive, vexatious or unfair manner (*Lategan & others v Lategan NO & others* 2003 (6) SA 611 (D) 621) and that a proportionate approach to balancing constitutional rights against the public need for investigation is followed (*Swart & others v Fourie & others* [2017] ZAWCHC 58 (22 May 2017) paras 24–6). The inquiry is essentially an interrogation in which information is sought to be pieced together so that the affairs of the company may be properly wound up (*Leech & others v Farber NO & others (supra)* 450–1). Its objectives are to assist liquidators in assessing whether directors and officers of the company may have contravened the

Companies Act or committed offences, establishing whether there are grounds for the disqualification of directors and to determine the company's assets and liabilities so that assets may be recovered and liabilities settled in a manner that serves the interest of the company's creditors (*Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC) 765–6). As long as the enquiry has a proper underlying purpose, it does not amount to abuse if the liquidator happens to receive an advantage by extracting particular evidence from the witness (*Roering NO & another v Mahlangu & others* 2016 (5) SA 455 (SCA) 471). When documents are requested that relate to the company's affairs, their relevance trumps any right to privacy (*Gumede & others v Subel NO & others* 2006 (3) SA 498 (SCA) 504–5). The fact that the requesting creditor had an undisclosed ulterior motive

for requesting documents is not a ground for the court to review the decision of the commissioner if that decision was based on the existence of reasonable grounds to believe that the documents were relevant (*idem* 507–8).

Although the Master or commissioner appointed to conduct the inquiry is in overall control of it, the liquidator and any creditor, member or contributory to the company has the right to interrogate witnesses (s 418(1)(c)). The presiding officer is under no legal obligation to provide examinees with a list of the topics on which they are to be interrogated or respond to questions regarding the subject matter of the inquiry (*Lategan & others v Lategan NO & others (supra)* 623–5). An examinee, for his part, has no right to the disclosure of information or access to documents in the possession of the questioner and is not entitled to refuse to answer questions concerning his dealings with the company until this disclosure or access

has been provided (*Leech & others v Farber NO & others (supra)* 449–53). Nor is an examinee entitled to rely on the ‘right to a fair trial’ or the potential loss of a tactical advantage to escape examination on issues that are the subject of pending criminal charges (*Mitchell & another v Hodes & others NNO (supra)*).

An examinee may be required to answer a question even though the answer may incriminate him. If the examinee refuses to answer on that ground, the Master or the court may, after consulting with the Director of Public Prosecutions having jurisdiction, compel the examinee to answer (s 417(2)(b)). As in an interrogation under s 415, incriminating evidence obtained at or derived directly from the inquiry is inadmissible in criminal proceedings against the witness or the company of which he was an officer, except for criminal proceedings for perjury and related offences (s 417(2)(c) and see *Ferreira v Levin NO & others and Vryenhoek & others v Powell NO & others* 1996 (1) BCLR 1 (CC) 94–5.

Since s 417 refers to the making of a winding-up order, an inquiry under s 417 cannot be held in a voluntary winding-up, unless it has either been converted into a winding-up by the court in terms of s 346(1)(e) or if the court grants leave under s 388 for the convening of an enquiry (*Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg & others* 2002 (5) SA 239 (SCA) 242). The reference in s 417 to a company unable to pay its debts means that a s 417 inquiry cannot be held if the company was placed in liquidation on the just and equitable basis, unless it is proved that when the inquiry was called for, the company was unable to pay its debts (*Hudson v The Master & others* 2002 (1) SA 862 (T) 868).

23.10 Impeachable transactions

Under s 340(1), if a company is wound up and unable to pay its debts, every disposition of its property may be set aside, if the disposition, had it been made by an individual, could be set aside if he became insolvent. The provisions of the law of insolvency will apply, *mutatis mutandis* (with the necessary changes), to the disposition. The company must be unable to pay its debts at the time the section is invoked by the liquidator or creditor (*Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 (6) SA 358 (SCA) 361–2).

23.11 Release of liquidator

When a liquidator has performed all his prescribed duties and met all the requirements of the Master, he is entitled to a certificate to that effect. At the same time, the Master

Page 309

must state that he consents to the reduction of the security given by the liquidator to a stated amount or to its cancellation (s 385).

23.12 Personal liability and offences

The court may, in the course of the winding-up of a company, inquire into the conduct of any promoter, director or officer of the company (s 423(1)). If the court finds that there has been any breach of faith or trust in relation to the company, or that any property of the company has been misapplied or retained, the court may order the repayment or restoration of money or property to the company (*ibid*). Similarly, if it appears that any business of the company has been carried on recklessly or with the intent to defraud creditors, the court may declare that any person who was knowingly a party to the carrying on of the business in this manner will personally and without limitation of liability be

responsible for all or any of the debts or other liabilities of the company as the court may direct (s 424(1)).

The following should be noted regarding s 424:

- Even though s 424 still refers to 'winding-up, judicial management or otherwise', its field of application is now restricted to companies being wound up (Sch 5, item 9(1) of the 2008 Act).
- In considering whether a company's business has been carried on recklessly, the court has regard to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties, and the prospects, if any, of recovery (*Philotex (Pty) Ltd & others v Snyman & others; Braitex (Pty) Ltd & others v Snyman & others* 1998 (2) SA 138 (SCA) 144). The mere fact that a company trades while insolvent does not imply that its business is being carried on fraudulently or recklessly (*Ozinsky NO v Lloyd & others* 1995 (2) SA 915 (A)). The enquiry is essentially whether, at the time a debt was incurred, there was a genuine belief that the company would be able to pay the debt (*Heneways Freight Services (Pty) Ltd v Grogor* 2007 (2) SA 561 (SCA) 569).
- A person is regarded as having acted 'knowingly' for the purposes of the section if he knew of facts from which the conclusion might properly be drawn that the business of the company was being carried on recklessly or with intent to defraud creditors, even though he may not have actually known the legal consequences of those facts (*Howard v Herrigel & another NNO* 1991 (2) SA 660 (A)).
- A director may be a 'party' to the reckless or fraudulent conduct of the company's business even though he has not taken any positive steps in the

carrying on of the company's business (*Howard v Herrigel & another NNO (supra)*). But a person who, while carrying out his own independent business and, without joining the company in a common pursuit, incidentally enables a company to carry on its business fraudulently or recklessly, cannot be regarded as a party to the carrying on of the company's business (*Cooper & others NNO v SA Mutual Life Assurance Society & others* 2001 (1) SA 967 (SCA)).

- There need not be a causal link between the reckless conduct and the debts and liabilities in respect of which liability is to be imposed; the absence of a causal link is relevant to determining whether it is just and equitable to make an order (*Saincic & others v Industro-Clean (Pty) Ltd & another* 2009 (1) SA 538 (SCA)). There must

Page 310

be some connection in time between the conduct of the directors and the company's inability to pay (*Tsung & another v Industrial Development Corporation of South Africa Ltd & another* 2013 (3) SA 468 (SCA)).

- A creditor's rights under the section are not extinguished by the sanctioning and implementation of a compromise (*Kalinko v Nisbet & others* 2002 (5) SA 766 (W)). But if the compromise results in the termination of the company's winding-up, s 424 can no longer be invoked.
- Proceedings to obtain a declaration of personal liability in terms of s 424 may be brought in the name of the liquidator, acting *nomine officio* (in his official capacity), or in the name of the company in liquidation (*Fundstrust (Edms) Bpk (in likwidasie) v Marais en*

andere [1996] 3 All SA 574 (C)). A declaration of liability cannot be obtained by default judgment (*Minnaar v Van Rooyen NO* 2016 (1) SA 117 (SCA)).

23.13 Staying or setting aside of winding-up proceedings

The court may, at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, stay or set aside the proceedings for winding-up (s 354(1)). This order may be made either on the basis that the winding-up order ought not to have been granted at all, or because supervening events render a stay or setting aside necessary or desirable (*Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) 180, overruling *Storti v Nugent & others* 2001 (3) SA 783 (W); *Klass v Contract Interiors CC (in Liquidation) & others* 2010 (5) SA 40 (D)).

An applicant who seeks to stay or set aside winding-up proceedings bears the ordinary civil onus, regardless of whether the winding-up is a voluntary winding-up or a winding-up by the court (*Ex parte Strip Mining (Pty) Ltd: In re Natal Coal Exploration Co (in Liquidation) (Kangra Group (Pty) Ltd & another intervening)* 1999 (1) SA 1086 (SCA)). In reaching a decision, the court may have regard to the wishes of the creditors or members if proved to it by sufficient evidence (s 354(2); *SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) 375). For evidence to be 'sufficient' for these purposes, it should indicate that the creditors have applied their minds to the matter, and it should provide the factual basis on which they have formed their view (*Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) 613). More is required, for example, than a set of vaguely expressed letters which fail to indicate any

knowledge of the company's financial woes or show why a postponement would be advantageous for creditors (*idem* 614).

The court may also intervene in a voluntary winding-up and give directions on how that winding-up must be continued (s 354(1)).

23.14 Dissolution and deregistration

The dissolution and deregistration of companies is regulated by ss 82 and 83 of the 2008 Act. Deregistration entails removing the name of a company from the companies register (s 83(1)). The effect is generally that the company is dissolved, the only exception being where the reason for the removal is that the company is transferring its registration to a foreign jurisdiction (s 83(1)). Although the terms 'dissolution' and 'deregistration' are used, these concepts cannot be separated.

Page 311

In a winding-up, when the affairs of a company have been completely wound up, the Master must send a certificate to that effect to the Commission (s 82(1) of the 2008 Act), who must record the dissolution of the company and remove its name from the companies register (s 82(2) of the 2008 Act). In addition to this provision, s 419 of the 1973 Act also continues to apply to this situation because it forms part of Chapter 14 of that Act (see Sch 5, item 9 of the 2008 Act). In relation to solvent companies, the provisions of the 2008 Act prevail in the event of a conflict between it and Chapter 14 of the 1973 Act (Sch 5, item 9(3) of the 2008 Act). But the transitional arrangements are silent on the resolution of a conflict in relation to an insolvent company. Section 419 of the 1973 Act is more onerous than s 82 of the 2008 Act in that the Commission is

required to publish a notice of dissolution in the *Gazette* (s 419(2)).

When a company is dissolved, its legal life comes to an end, and nothing remains of it. If assets of the company were not transferred before dissolution, they accrue to the State as *bona vacantia* (unclaimed property) (*Rainbow Diamonds (Edms) Bpk en andere v Suid-Afrikaanse Nasionale Lewensassuransiematskappy* 1984 (3) SA 1 (A)).

The Commission is obliged to keep a register containing the details of directors of dissolved companies which were unable to pay their debts (s 421).

A company that has ceased carrying on business can be deregistered on request to the Commission if it has been determined that the company has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being wound up (s 82(3)(b)(ii) of the 2008 Act).

Chapter 24

Winding-up of close corporations

Synopsis

- 24.1 Voluntary winding-up
- 24.2 Winding-up by court
 - 24.2.1 Jurisdiction of court
 - 24.2.2 When corporation may be wound up by court
- 24.3 Appointment of liquidator
- 24.4 Meeting of creditors and members
- 24.5 Liquidator's report to creditors and members
- 24.6 Setting aside of payments to members
 - 24.6.1 Payments by reason of membership
 - 24.6.2 Salary or remuneration
 - 24.6.3 Liquidator's duty to investigate personal liability of members
- 24.7 Misapplication of money or property
- 24.8 Composition
- 24.9 Dissolution and deregistration of corporation

This chapter refers to sections of the Close Corporations Act 69 of 1984 unless otherwise indicated. A close corporation is called simply a 'corporation'.

The winding-up of a close corporation is dealt with by the Close Corporations Act, but this Act effectively incorporates many of the provisions of the 1973 and 2008 Companies Acts on winding-up and makes them applicable to close corporations. Thus, s 66(1) of the Close Corporations Act

says that the provisions of Chapter 14 of the 1973 Companies Act, with the changes required by the context, apply to the liquidation of a close corporation, unless the Close Corporations Act has specifically provided for the matter. The winding-up of a corporation must be administered according to the 1973 Companies Act (s 67(2)). Section 66(2) sets out how various words and phrases should be understood when the Companies Act and Insolvency Act are being applied to close corporations.

Like a company, a close corporation may be wound up voluntarily or by the court. A voluntary winding-up may be either a creditors' voluntary winding-up, a voluntary winding-up by the corporation (solvent close corporation), or a members' voluntary winding-up (insolvent close corporation).

A close corporation can be placed in business rescue and can also conclude a statutory compromise with its creditors (s 66(1A)). In addition, a close corporation may enter into a composition once it is in liquidation (s 72).

24.1 Voluntary winding-up

A corporation may be wound up voluntarily through a unanimous written resolution of its members (s 66(2)(b)(i); cf s 1 sv 'special resolution' of the 2008 Companies Act). The provisions of the 2008 and 1973 Companies Acts apply to close corporations, read with the changes required by the context (see 23.3).

24.2 Winding-up by court

24.2.1 Jurisdiction of court

Although only a High Court has jurisdiction to wind up a company (see 23.2.1), both a High Court and a magistrate's court have jurisdiction to wind up a corporation (ss 7 and 66(2)(a)(xiv); see also s 29(1)(fA) of the Magistrates' Courts Act 32 of 1944). The court having jurisdiction is the one that has jurisdiction where the corporation's registered office or main place of business is situated (s 7).

24.2.2 When corporation may be wound up by court

The grounds for the winding-up of a close corporation, and the parties who may apply for its winding-up, mirror those for solvent and insolvent companies (see 23.2.2–23.2.4). Although s 69 sets out when a corporation will be considered unable to pay its debts, it does so expressly '[f]or the purpose of section 68(c)' and s 68 (which previously set out the grounds for the winding-up of a corporation) has been repealed. This position makes it uncertain whether a corporation's inability to pay its debts must be established under s 345 of the 1973 Companies Act, to which s 344(f) refers, or under the retained s 69. Section 345 and s 69 differ only in minor respects. Section 69 was applied in *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and another case* 2013 (2) SA 439 (FB) and *Body Corporate Santa Fe Sectional Title Scheme No 61/1994 v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ).

24.3 Appointment of liquidator

As soon as practicable after a provisional winding-up order has been made or a resolution for voluntary winding-up has been registered, the Master must, in accordance with policy determined by the Minister, appoint a suitable natural person as a liquidator (s 74(1)–(2)). In a members'

voluntary winding-up, the Master must, when deciding whom to appoint, consider any person nominated by the corporation (s 74(3)). In other cases, the Master has a wide discretion.

The Master may decline to appoint a nominee if he was not properly nominated, or is disqualified from being appointed, or if he fails to give security within the stipulated time for the due performance of his duties (s 76(1)).

Any person aggrieved by the Master's appointment of, or refusal to appoint, a liquidator may, within seven days, request the Master in writing to submit his reasons for such appointment or refusal to the Minister (s 66 read with s 371 of the Companies Act 61 of 1973; *Gedult v The Master & others* 2005 (4) SA 460 (C) 463–4; see also 1.5 and 23.6.2).

The Master may appoint a person as co-liquidator (ie, joint liquidator) if he was nominated as such at the first meeting of creditors and gives security to the satisfaction of the Master for the proper performance of his duties (s 74(4)). Before nominations for

a co-liquidator may be considered at the first meeting of creditors, the meeting has to vote, according to value, on whether a co-liquidator should be appointed (*Spence v The Master & others* 2000 (2) SA 717 (T)).

24.4 Meetings of creditors and members

Within a month after a final winding-up order has been made or a resolution for a creditors' voluntary winding-up has been registered, the liquidator (not the Master) must summon a meeting of creditors and a meeting of members

(s 78(1); *De Wit v Boathavens CC (King & another intervening)* 1989 (1) SA 606 (C) 615). The purpose of the creditors' meeting is to consider the statement of the corporation's affairs lodged with the Master, prove claims against the estate, decide whether a co-liquidator should be appointed, and receive directions or authorization on any matter regarding the liquidation (s 78(1)(a)). The members' meeting is held to consider the statement of the corporation's affairs (unless this has been done already by the members when passing a resolution for voluntary winding-up), and for the liquidator to receive or obtain directions or authorization on any matter regarding the liquidation (s 78(1)(b)).

24.5 Liquidator's report to creditors and members

Except in a members' voluntary winding-up, a liquidator must, within three months from the date of his appointment, submit to a general meeting of creditors and members a report on these matters (s 79(a)–(i)):

- the estimated amounts of the corporation's assets and liabilities;
- if the corporation has failed, the causes of the failure;
- whether he has submitted or intends to submit to the Master a report about possible offences committed by members;
- whether any member or former member appears to be liable to the corporation for breach of trust or negligence;
- whether any member or former member appears to be liable to make repayments to the corporation or to a creditor of the corporation (see 24.6);
- any legal proceedings by or against the corporation which may have been pending at the date of the

- commencement of the winding-up, or which may have been or may be instituted;
- whether further inquiry is in his opinion desirable in regard to any matter relating to the formation or failure of the corporation or the conduct of its business;
 - whether the corporation has kept the accounting records required by s 56 and, if not, in what respects the requirements of that section have not been met;
 - the progress and prospects in respect of the winding-up; and
 - any other matter which he may consider fit, or in connection with which he may require the directions of the creditors.

24.6 Setting aside of payments to members

In the winding-up of a corporation unable to pay its debts, members may be compelled to repay money which they received from the corporation before liquidation. If what is owed is not repaid in full, former members may be called upon to contribute.

Page 315

24.6.1 Payments by reason of membership

A member who received a payment by reason only of his membership (eg, a distribution of profit or a repayment of his contribution to the corporation), within two years before the commencement of the winding-up, must repay the amount concerned to the corporation unless he can prove that

- after the payment was made, the corporation's assets, fairly valued, exceeded its liabilities;

- the payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and
- the payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of its business (s 70(2)).

A person who stopped being a member within the two-year period is liable to contribute to the repayment to the extent that the amount repaid by present members, together with all other available assets, cannot discharge all the corporation's debts (s 70(3)).

A certificate by the Master as to the amount payable by a member or former member has the effect of a civil judgment on which a warrant of execution may immediately be issued (s 70(4)).

24.6.2 Salary or remuneration

A member may be required to return a salary or other remuneration paid to him in his capacity as an officer or employee of the corporation within two years before the commencement of the winding-up (s 71(1)). The Master must consider the payment, and if, in his opinion, it was not *bona fide* or reasonable in the circumstances, he must direct that it, or such part as he may determine, be repaid by the member (*ibid*).

The Master may also direct that a former member—ie, one who stopped being a member in the two-year period—must contribute to the repayment to the extent that the amount repaid by the present members, together with all the other available assets of the corporation, cannot pay all the debts of the corporation (s 71(2)).

A certificate by the Master as to the amount payable has the effect of a civil judgment (s 71(3)).

24.6.3 Liquidator's duty to investigate personal liability of members

The liquidator must ascertain whether members of the corporation are liable to make repayments or whether circumstances justify an approach to the Master for a direction that repayments be made (s 80(a)–(b)). If necessary, the liquidator must take steps to enforce the repayments (s 80(c)).

The liquidator must also establish whether any member, former member or other person is, by virtue of Part VIII of the Act, jointly and severally liable with the corporation for one or more of its debts (s 81(1)). (Part VIII deals with the following: s 63—joint liability of certain persons for the corporation's debts; s 64—liability for reckless or fraudulent carrying on of the corporation's business; and s 65—the court's powers in relation to abuse of the corporation's separate juristic personality.) If the liquidator finds that there is personal liability to a creditor who has proved his claim, he must inform the creditor concerned and, if the latter

Page 316

recovers any amount directly from the person concerned, the liquidator must take this into account when determining the dividend payable to the creditor.

24.7 Misapplication of money or property

Section 73(1) provides a remedy much like that created by s 423(1) of the Companies Act (see 23.12). The remedy is available against any present or former member, any officer or accounting officer of the corporation, or any person who has taken part in the formation of the corporation who has

- misapplied, or retained, or become liable or accountable for, the corporation's money or property; or
- been guilty of any breach of trust in relation to the corporation.

On application by the liquidator, or any creditor or member, or the Master, the court may inquire into the person's conduct and order him to

- repay the money (with interest) or restore the property, or any part of it; or
- contribute to the corporation's assets, by way of damages, a sum which the court considers just (s 73(1)).

Section 73(1) applies even though the perpetrator concerned may also be criminally responsible for his conduct (s 73(2)).

24.8 Composition

At any time after the commencement of the liquidation of a corporation unable to pay its debts, any person may submit a written offer of composition to the liquidator (s 72(1)). If the liquidator considers that the creditors will probably accept the offer, he must send or deliver a copy of the offer, together with his report on it and an explanation of the effect of the composition, to every known creditor and to the Master (s 72(2)). If the liquidator considers that the creditors will be unlikely to accept the offer, or that he has insufficient information at his disposal to make a recommendation, he must inform the offeror in writing that the offer is unacceptable and that he does not propose circulating it to the creditors and the Master (s 72(3)). The offeror may then, within a prescribed period, make written representations to the Master. After allowing the liquidator 14 days to comment on the offeror's representations, the

Master must consider the representations and comments and may then direct the liquidator to circulate a copy of the offer to the creditors, together with his report on it and an explanation of the effect of the composition (s 72(4)).

When circulating an offer of composition, the liquidator must notify the creditors of the meeting at which the offer will be considered (s 72(5)). This may be a general meeting of the creditors, duly publicized (s 72(6)). Such a meeting may be held only once a final winding-up order has been made (see *De Wit v Boathavens CC (King & another intervening)* 1989 (1) SA 606 (C)).

Once accepted, the composition binds every person who had notice and was entitled to vote at the meeting, as long as

- it was accepted by two-thirds (in number and in value) of the creditors who proved claims against the corporation;
- payment under the composition is made or secured as specified in the offer;

Page 317

- the rights of secured or preferent creditors are not prejudiced (unless waived in writing) (s 72(7)).

An offer of composition may not be accepted if it contains any provision by which a creditor would receive a benefit not obtainable in the ordinary distribution of the estate (s 72(7)(a)). A composition does not affect the liability of a surety for the corporation, which continues unchanged (s 72(8)).

All payments to, and steps in favour of, the creditors under the accepted composition must be paid and taken by the liquidator (s 72(9)). He must also frame an account and plan of distribution of the corporation's assets (s 72(10)).

The composition may provide for the winding-up of the corporation to be set aside by the court (s 72(11)). If it does so, the offeror may apply to court for the relevant order. At least three weeks before the application, he must advertise his intention in the *Government Gazette* and serve copies of the application on the Master, the Registrar and the liquidator (*ibid*). The offeror's application may be opposed by a creditor or interested person on the grounds that

- the composition unfairly harms the interests of the creditor;
- the meetings for considering the composition involve a material irregularity;
- insufficient or materially inaccurate information about the composition was disclosed; or
- there is another ground that the court may deem sufficient (s 72(12)).

24.9 Dissolution and deregistration of corporation

The provisions of the 2008 Companies Act on the deregistration and dissolution of companies, read with the changes required by the context, also apply to close corporations (s 26 of the Close Corporations Act, referring to ss 81(1)(f), 81(3), 82(3)–(4), and 83 of the 2008 Act; see 23.14).

Chapter 25

The commencement of business rescue proceedings

Synopsis

- 25.1 The nature and purpose of business rescue proceedings
- 25.2 Substantive requirements for the commencement of business rescue proceedings
 - 25.2.1 Financial distress and alternative financial criteria
 - 25.2.2 Reasonable prospect of rescuing the company
- 25.3 The commencement of business rescue proceedings
 - 25.3.1 Voluntary business rescue (directors' resolution)
 - 25.3.2 Compulsory business rescue (court application)
 - 25.3.3 Duration of business rescue proceedings

A company in financial trouble has two possible alternatives to winding-up: business rescue proceedings or a compromise with its creditors. Compromise is explained in chapter 28, while this chapter and chapters 26 and 27 focus on business rescue. Both business rescue and compromise are dealt with in Chapter 6 of the Companies Act 71 of 2008. References to sections are to sections of this Act unless otherwise stated.

Chapter 6 applies also to close corporations, with changes as required by the context (s 66(1A) of the Close

Corporations Act 69 of 1984). In these four chapters dealing with business rescue and compromise with creditors, any reference to a company must be taken to include a corporation too.

An external company (one incorporated in a jurisdiction other than South Africa and that has not transferred its registration to South Africa) is not a 'company' as defined and cannot be placed in business rescue in terms of Chapter 6 (*Cooperativa Muratori & Cementisti & others v Companies and Intellectual Property Commission & others* 2021 (3) SA 393 (SCA) 396–7).

A difference of regulatory function and administrative responsibility must be noted. Winding-up is regulated by the Master of the High Court, and business rescue by the Companies and Intellectual Property Commission (the Commission).

25.1 The nature and purpose of business rescue proceedings

The purpose of business rescue is to facilitate the rehabilitation of a financially distressed company. The idea is that the company will enjoy temporary protection from

Page 319

its creditors while its problems are attended to by an independent business rescue practitioner (the practitioner), who will propose a plan to rescue its business.

The efficient rescue and recovery of distressed companies in a way that balances the rights and interests of relevant stakeholders is an express purpose of the Companies Act (s 7(k)). The underlying philosophy is that putting companies into liquidation often causes much collateral damage, economically and socially, destroying wealth and

livelihoods. This socio-economic damage should be prevented if reasonably possible, in the public interest (*Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd & others* 2012 (2) SA 378 (WCC) 382). Unlike liquidation, which prioritizes the interests of creditors, business rescue aims to balance the diverging interests of creditors, shareholders and employees (*Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2012 (3) SA 273 (GSJ) 278–9 (*Oakdene GSJ*); *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* 2017 (4) SA 51 (WCC) 59). This principle points to a legislative preference for business rescue over the liquidation of viable businesses (*Ferrostaal GmbH & another v Transnet SOC Ltd & another* 2021 (5) SA 493 (SCA) 503; *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others* 2014 (1) SA 103 (KZP) 108–9), but only where there is a genuine attempt to achieve the aims of the Act (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) 426).

The term 'business' rescue indicates that it is not necessary to preserve the company as a legal entity: transferring the business or parts of it to one or more other entities still aligns with the policy considerations for introducing this procedure (*Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) 551 (*Oakdene SCA*)). But business rescue should not be used when there is no business to resuscitate (*Van der Merwe v Zonnekus Mansion (Pty) Ltd (CSARS and Standard Bank of South Africa Limited intervening parties)* 2017 JDR 0023 (WCC) paras 56–8). In these cases it would simply prolong the agony and postpone the inevitable (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (supra)* 432). To use a medical analogy: business rescue is not meant for

terminally or chronically ill companies, but for ailing ones (*Welman v Marcelle Props* 193 CC 2012 JDR 0408 (GSJ) para 28).

Business rescue replaced judicial management under the Companies Act 61 of 1973. The reforms address several generally accepted shortcomings of judicial management. Given this historical context, the interpretation of business rescue must be cognisant of the legislative attempt to avoid the mistakes of the past (*Oakdene SCA* 551–2). One of these mistakes was the high threshold for the commencement of judicial management. To make business rescue proceedings more accessible, the substantive requirements as well as the methods of commencement were reformed. Unlike judicial management, which could be ordered only by a court subject to strict requirements, business rescue can be opened either through a court order or by a resolution of the company's board of directors. Depending on whether the proceedings were commenced by board resolution or by court order, they are described as 'voluntary business rescue' and 'compulsory business rescue', respectively (see, eg, *Shiva Uranium (Pty) Ltd (in Business Rescue) & another v Tayob & others* 2022 (3) SA 432 (CC) 442), although these terms are not used in the Act.

As with other insolvency proceedings, there is always a risk that business rescue proceedings may be abused. Rather than aiming to rescue a company, these proceedings might, for example, seek to

- obtain a temporary respite from creditors, such as preventing attachment and sales in execution (*Swart v Beagles Run Investments 25 (Pty) Ltd (Four creditors intervening)* 2011 (5) SA 422 (GNP) 429; *Engen Petroleum Ltd v Multi Waste (Pty) Ltd & others* 2012

- (5) SA 596 (GSJ) 598 602; *Alderbaran (Pty) Ltd & another v Bouwer & others* 2018 (5) SA 215 (WCC) 219–20 228–9; *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others; Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd* [2020] ZAGPJHC 255 (14 August 2020) paras 60–5);
- thwart a liquidation application (*ABSA Bank Limited v Newcity Group (Pty) Ltd and another related matter* [2013] 3 All SA 146 (GSJ) 16 17); *Oakdene SCA* 541 553); or
 - preclude the liquidators from proceeding with the winding-up process if the company is already in liquidation (*Van der Merwe v Zonnekus Mansion (Pty) Ltd (CSARS and Standard Bank of South Africa Limited intervening parties)* (*supra*) paras 96–104).

Courts are alert to the risk of abusive proceedings for companies with no prospect of financial recovery, both when they exercise their discretion on ‘friendly’ applications (*idem* paras 96–104; *ABSA Bank Limited v Newcity Group (Pty) Ltd and another related matter* (*supra*)) and when considering the setting aside of boards’ business rescue resolutions (see *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others* (*supra*) paras 59–64).

25.2 Substantive requirements for the commencement of business rescue proceedings

To qualify for business rescue, the company must satisfy two substantive criteria:

- it must be financially distressed or meet one of the alternative financial criteria (ss 129, 131); and
- there must be a reasonable prospect of rescuing the company.

25.2.1 Financial distress and alternative financial criteria

The most important financial criterion is financial distress as defined in s 128. It is always a requirement for voluntary business rescue (s 129). In compulsory business rescue (see 25.3.2), the company must either be financially distressed or else one of the two alternatives in s 131 must apply to it. These alternative possibilities are useful for applicants who might not have access to enough financial information about the company to prove that it is financially distressed. Although the alternatives may be relied on in a business rescue application, the definition of 'business rescue' and several other provisions of Chapter 6 assume that the company must be financially distressed. One of these provisions is s 141(2)(b), obliging the practitioner to take steps to terminate the business rescue proceedings if at any time it appears that the company is no longer financially distressed.

Page 321

(i) Financial distress

A company is 'financially distressed' if

- it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
- it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (s 128(1)(f) *sv* 'financially distressed').

In *Gormley v West City Precinct Properties (Pty) Ltd* 2013 JDR 1895 (WCC) para 11 and *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Limited* 2013 JDR 1019 (GSJ) para 8, the court adopted a narrow interpretation of

'financially distressed' and held that a company that is already insolvent, even if only able to pay its debts over an extended period, is not financially distressed as defined in the Act. But in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* the Supreme Court of Appeal readily accepted that the company in that matter was financially distressed although clearly it was hopelessly insolvent (*Oakdene SCA 543*). Current commercial or factual insolvency is thus not a bar to business rescue proceedings (*Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* 2017 (3) SA 74 (WCC) 79).

(ii) Failure to pay amounts due as employer

The first alternative to financial distress is that the company has failed to pay any amount due in terms of a public regulation or contract pertaining to employment-related matters (s 131(4)(a)(ii)). This includes payments due to persons other than employees, such as employees' tax withheld or contributions in respect of unemployment insurance. The non-payment of employees is often an early indication or predictor of financial distress. This alternative is particularly useful for trade unions and employees who apply for business rescue, although any applicant who is an affected person (s 131(1)) may rely on it. The court will consider the circumstances of the non-payment in exercising its discretion on the merits of placing the company in business rescue.

(iii) Other financial reasons making business rescue just and equitable

The second alternative on which a court may base the financial circumstances element of the substantive requirements is that a business rescue order is otherwise just and equitable for financial reasons (s 131(4)(a)(iii)).

This alternative gives the court a wide discretion to order proceedings when the company experiences financial difficulties, whether or not it is financially distressed as defined (*Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* (*supra*) 80). The word 'otherwise' suggests that it must be the same kind of financial difficulties as the preceding alternatives—circumstances pointing to financial difficulties experienced by the company (but see the remarks made in passing in *Oakdene GSJ* 281 that, apart from the company's own financial health, a court might also consider the financial circumstances of affected persons).

25.2.2 Reasonable prospect of rescuing the company

The second substantive requirement for business rescue proceedings is that there must be a reasonable prospect that the company can be rescued (s 131(4)(a)). Besides being

Page 322

the most frequently litigated requirement for the opening of business rescue proceedings, the existence of a reasonable prospect of rescue is a continuing prerequisite for the company remaining in business rescue. The practitioner must consider it after investigating the company's affairs (s 141(1)) and report on it to creditors (s 147) and employees (s 148) at their first meetings and again to the meeting convened to vote on the proposed plan (s 152). If, at any time during the proceedings, the practitioner concludes that there is no reasonable prospect of rescue, he must disclose this to the court, the company, and all affected persons and apply to court to end the business

rescue proceedings and place the company in liquidation (s 141(2)(a)).

(i) Meaning of rescue

The phrase 'rescuing the company' in this context means achieving the goals set out in the definition of 'business rescue' (s 128(1)(h) *sv* 'rescuing the company'). The definition describes business rescue as proceedings to facilitate the rehabilitation of a company that is in financial distress through

- the temporary supervision of the company and the management of its affairs, business and property;
- a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner
 - that maximizes the likelihood of its continuing in existence on a solvent basis or, if this is not possible,
 - that results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company (called the secondary goal) (s 128(1)(b) *sv* 'business rescue').

The 'goals' refer to the desired results or outcomes of a business rescue plan (*Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another* 2013 (1) SA 542 (FSB) 544). These results or outcomes are that the company should continue to exist on a solvent basis, called the primary goal, or that creditors or shareholders will get a better return than they could expect in an immediate liquidation, called the secondary goal. The courts initially

differed on the issue of whether business rescue proceedings may be used to secure a better return for creditors or shareholders where it is already clear at the outset that there is no likelihood of the company's being restored to solvency. Four decisions held that business proceedings could be used in this way. See *Swart v Beagles Run Investments 25 (Pty) Ltd (Four creditors intervening)* 2011 (5) SA 422 (GNP) 431, *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) 432, *Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd & others* 2012 (2) SA 378 (WCC) 384, and *Oakdene GSJ* 289. But three other decisions held that business rescue proceedings could not be used in this way; this interpretation was based on the ordinary meaning of the word 'rehabilitation' and implied that the secondary goal could be resorted to only in the course of business rescue proceedings. See *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd & others (Marley Pipe Systems (Pty) Ltd & another intervening)* 2012 (5) SA 515 (GSJ) 521–2, *Gormley v West City Precinct Properties (Pty) Ltd* 2013 JDR 1895 (WCC) para 12, and *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd & another*,

Investec Bank Ltd v Aslo Holdings (Pty) Ltd [2012] ZAWCHC 110 (22 February 2012) paras 17 and 19. The Supreme Court of Appeal ended the controversy when it held that both outcomes are covered by the special meaning of 'rehabilitation' as used in s 128(1)(b). So the so-called secondary goal of achieving a better return is a stand-alone or independent goal on which an application can be based when the first goal cannot be achieved (*Oakdene SCA* 549–51). The Supreme Court of Appeal held that it was a sensible policy to afford a company temporary protection

against creditors' claims to enable the sale of its business as a going concern to optimize the return to creditors (*idem* 551). This policy overcomes one of the shortcomings of judicial management, which could be used only if the company was expected to recover and pay all its debts in full. But it remains a qualified alternative in the sense that it cannot be pursued if the primary goal might be achieved instead.

(ii) Reasonable prospect

There must be a reasonable prospect of rescuing the company. A prospect refers to an expectation (*Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another (supra)* 545) that one of two uncertain future events will happen—the eventual recovery of the company or a better return (*ABSA Bank Limited v Newcity Group (Pty) Ltd and another related matter* [2013] 3 All SA 146 (GSJ) para 14). It means a possibility based on reasonable grounds (*Oakdene SCA* 551–2). Although a reasonable possibility is a lower threshold than the reasonable probability that applied to judicial management under the 1973 Act, proving that there is a reasonable prospect still requires something more than a *prima facie* case or an arguable possibility (*ibid*).

The application papers must establish a factual basis that there is a reasonable prospect of achieving either goal of business rescue. Although it is not necessary to provide a substantial measure of detail about how the proposed outcome can be achieved, a mere speculative suggestion is not enough (*idem* 551; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another (supra)* 545). Parties and courts considering whether there is a prospect of rescue often refer to a proposed 'plan' to rescue the company, but in this sense, it simply means the basis advanced for asserting that the company can be rescued

(*Finance Factors CC v Jayesem (Pty) Ltd* 2013 JDR 1901 (KZD) para 22). The formal business rescue plan must be drafted by the business rescue practitioner after proper investigation in terms of s 141 (*Oakdene SCA* 553; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another (supra)*).

There is no prescribed minimum list of particulars that must be provided (*Oakdene SCA* 552; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another (supra)* 546). The level of specificity required in an application depends on the circumstances of each case. The availability of business rescue proceedings should not be unjustifiably limited by insisting on details that would establish a probability (*Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another (supra)* 546). One of the considerations is the degree of information that a particular applicant could reasonably be expected to provide on the company's position (*idem* 545; and see *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited & another, In re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* [2012] ZAGPPHC 359 (16 May 2012) paras 16–17). A negative inference can be drawn when, in opposing an application, the company fails to address issues raised by the

applicant that fall peculiarly within the company's knowledge (*Ziegler South Africa (Pty) Ltd v South African Express SOC Ltd & others* 2020 (4) SA 626 (GJ) para 63).

When the primary goal is pursued, the idea is to restore the company to a solvent going concern. It will not be enough to show that the company will be factually solvent once all its assets have been realised (*Oakdene SCA* 555–

6). Accordingly, the relevant factors could include whether financing will be available to fund the continued or resumed business operations; whether key suppliers are prepared to continue providing goods and services; and whether the company's major creditors support the proposed strategy (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*). The reasons for the company's distress are also relevant. If the company's difficulties are attributable to factors that could be overcome in the proceedings, such as poor management (*Ziegler South Africa (Pty) Ltd v South African Express SOC Ltd & others (supra)* 636), there would be a better prospect than when the sector in which the company operates suffers from a protracted general economic downturn (see *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another (supra)* 547–8 in relation to property development).

Although achieving a better return than immediate liquidation is an acceptable goal, this does not mean that business rescue can be used to achieve an informal winding-up without the consequences of liquidation proceedings (*Oakdene SCA* 553). The reasonable prospect of rescue must be based on a better return than immediate liquidation, and the liquidation comparator is critical. This comparison may require particulars about the company's assets and liabilities, based on reliable valuations and assumptions (*Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* 2017 (3) SA 74 (WCC) 78–9 81–2), to calculate the expected liquidation distribution. Information on the alternative return achievable in business rescue is equally important. When comparing the expected proceeds of the realization of assets in the two procedures, it should not be assumed that a forced sale (a fire sale) is the only option available to a liquidator (*idem* 82). Relevant

particulars may include the resources that could be applied to yield a better return through business rescue, such as financing that would be available to complete a land development project (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (supra)* 432) or the projected income stream that will enable the company to service rescheduled debts (*Oakdene SCA* 554–5; *Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* (*supra*) 91). Allegations that liquidation costs will exceed the costs of business rescue will have to be substantiated as part of the overall comparison (*Newcity Group (Pty) Limited v Pellow NO & others* [2014] ZASCA 162 (1 October 2014) para 21), bearing in mind that the legislature could not have intended to introduce business rescue as an alternative simply to save on liquidation costs (*Oakdene SCA* 553).

Although we have cited *Oakdene SCA* in support of several points already, a longer discussion of this significant judgment—the first Supreme Court of Appeal decision on business rescue—gives a holistic impression of how diverse factors can contribute to a value judgement on the merits of business rescue. *Oakdene SCA* not only ended the debate over whether ensuring a better return for creditors and/or shareholders could be pursued as an independent goal of business rescue but also gave direction to integrating the new Chapter 6 rescue procedure into the commercial landscape where different options are available to distressed companies and their creditors.

This was an appeal against the dismissal of a business rescue application and the granting of a liquidation order. The purpose of the original business rescue application in the High Court (*Oakdene GSJ*) was to stop a sale in

execution of two of the company's three fixed properties consisting of the Kyalami racing complex. As the company was in liquidation, a sale in execution was no longer possible, so the appellants tried to show that business rescue would result in a better return for creditors than liquidation would. The appellants considered that a business rescue practitioner could sell the property for more than would be possible in a liquidation.

The appellants included the holder of 40 per cent of the shares in the company. The remaining two shareholders opposed the business rescue application: one of them was also a major creditor of the company and held a mortgage bond over its immovable property. The company was involved in several disputes and pending court cases about agreements concluded on its behalf with entities associated with some of the directors:

- the validity of an unprofitable lease agreement of its property;
- evicting the current occupier of the premises because a purported cession of the rights under the disputed lease was invalid;
- an attempt to dispose of the company's development rights over the immovable property; and
- the alleged cession of the company's income stream and the collection of rentals due to it.

The appellants argued that they had to show not a reasonable prospect of achieving one of the goals contemplated in s 128(1)(b) but merely that a plan to do so could be developed and implemented regardless of whether the plan might fail. The respondents said that to qualify for business rescue, the company must be able to be restored to solvency and that the secondary goal of ensuring a better return for creditors or shareholders did not qualify as 'rescuing' or 'rehabilitating' a company.

The court held that deciding whether there was a reasonable prospect of rescuing a company involves not the exercise of a discretion in the strict sense but a discretion in the loose sense of a value judgement. Accordingly, a court of appeal can bring its own judgement to bear on the matter and interfere if it would come to a different conclusion. The court's discretion is bound up with the question whether there is a reasonable prospect of rescuing the company. Business rescue means facilitating the 'rehabilitation' of a company, which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than they would receive through immediate liquidation. An application can be based on either of these goals. The argument that 'rescue' and 'rehabilitation' imply a reasonable prospect of restoring the company to solvency fails to recognize that s 128(1)(b) gives its own meaning to these terms, which do not coincide with the dictionary definitions of the terms.

The court then considered the merits of business rescue. Satisfying a court that there is a prospect of rescue requires more than a mere *prima facie* case or an arguable possibility. Some factual basis must be established on the papers. Although motion proceedings may not be ideally suited to resolving the factual disputes often involved in business rescue matters, motion proceedings remain the procedure prescribed by the Companies Act and the normal rules for these proceedings apply. The requirement of a 'reasonable' prospect means that the prospect must be based on reasonable grounds. Even though it is unnecessary to provide a substantial measure

of detail about the proposed plan to satisfy this requirement, a mere speculative suggestion is not enough.

The applicant must establish grounds for the reasonable prospect of achieving one of the two goals. The actual plan can be left to the business rescue practitioner after a proper investigation in terms of s 141.

The appellants' argument that a court should grant a business rescue application simply because the applicant could develop and implement a plan, even if the court is unconvinced that the plan might work, was rejected by the court as being in direct conflict with the express wording of s 128(1)(h). According to this section, 'rescuing the company' does require achieving one of the goals in s 128(1)(b). Self-evidently, the development of a plan cannot be a goal in itself. It can only be the means to an end. That end must be either to restore the company to a solvent going concern or at least to facilitate a better deal for creditors and shareholders than they would obtain from a liquidation process.

In the court's view, the options put forward by the appellants did not establish a reasonable prospect. There was no explanation of how a sale of the three properties as a unit during business rescue would yield a better return than in a liquidation. The argument that the costs of a business rescue practitioner would be lower than those of a liquidator was unsubstantiated. Nor did it consider the complications of the disputes and doubtful transactions. Liquidation would be better suited to resolving these issues. According to the court, the option of selling two properties and continuing to do business on the third was based on suspect valuations that ignored the effect of the onerous long-term lease and the disposal of the right to develop the properties. Even if the property could be sold at those valuations and the mortgagee paid off, there would be no income left to service the company's other debt, as its entire income stream had been ceded.

A final possibility raised by the appellants in argument was that the company could be restored to solvency by selling everything it had. The court commented that this outcome is not what is meant by restoring a company to solvency. If liquidation with a cash surplus amounted to business rescue, every commercially insolvent but factually solvent company would be rescuable. Restoring a company to solvency implies that it will be a going concern.

The Supreme Court of Appeal also commented on the value of a declared intent of a major creditor to oppose a business rescue plan. This was a factor in assessing the reasonable prospect of rescuing the company. If this creditor was to vote against the plan, the proceedings would fail unless the creditor acted unreasonably and the voting was set aside by the court. Along with the guidance on how to establish a reasonable prospect of rescue, this judgment provides useful direction on the circumstances in which liquidation may be preferable to business rescue proceedings (see Van der Linde 2014 *ABLU* paper). Various considerations are taken into account to determine whether there is a reasonable prospect of rescuing a company (see O'Brien and Calitz 2022 *TSAR* 25). These considerations are conveniently listed by the authors when reviewing a decade of legal precedents.

25.3 The commencement of business rescue proceedings

Business rescue proceedings against a company may be commenced through either a resolution adopted by the company's board of directors ('voluntary business rescue') or a court order ('compulsory business rescue').

25.3.1 Voluntary business rescue

(i) Board resolution

The board of directors of a company may resolve that the company voluntarily begin business rescue proceedings and may place the company under supervision if the board has reasonable grounds to believe that

- the company is financially distressed; and
- there appears to be a reasonable prospect of rescuing the company (s 129(1)(a) and (b)).

The resolution is of no effect until filed with the Commission (s 129(2)(b)); and see the prescribed form CoR123.1 and CIPC Practice Note 1 of 2020). In considering whether the substantive requirements for business rescue are satisfied, the board must act in good faith (*Griessel & another v Lizemore & others* 2016 (6) SA 236 (GJ) 257–9; *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others*; *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd* [2020] ZAGPJHC 255 (14 August 2020) paras 30 44).

A voluntary business rescue resolution may not be adopted if liquidation proceedings have been initiated by or against the company (s 129(2)(a)). This rule targets the abuse of voluntary business rescue to thwart liquidation applications. Liquidation proceedings are 'initiated' against a company when the application issued by the court is served on the company (*Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd & others* 2019 (6) SA 185 (GJ) 195; *Pan African Shopfitters (Pty) Ltd v Edcon Limited & others* [2020] ZAGPJHC 158 (10 July 2020)). But in *Mouton v Park 2000 Development 11 (Pty) Ltd & others* 2019 (6) SA 105 (WCC) 125 127, the court held that this initiation was when the applicant (which happened to be a company) took the 'preceding causative' step of adopting a resolution to bring a liquidation application. We regard the *Mouton* approach as

unworkable: it unduly limits the board's ability to commence business rescue proceedings while it might not know that a creditor is contemplating liquidation. For a natural person applicant, it will be difficult to establish objectively when the person decided to bring a liquidation application.

The initiation of liquidation proceedings does not prevent applications for compulsory business rescue (*Firststrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) 273). The court considering the liquidation application may also order business rescue on its own initiative in terms of s 131(7): in other words, without an application (see 25.3.2(iv)).

Once a business rescue resolution has been adopted, the company may not during business rescue adopt a resolution to begin liquidation proceedings (s 129(6)). This does not prevent other parties from applying for the compulsory liquidation of the company, subject to the general moratorium (see 26.1).

If the board has reasonable grounds to believe that the company is financially distressed, but does not adopt a business rescue resolution, the board must notify

each affected person in writing of the relevant criteria of financial distress that apply to the company and its reasons for not adopting the resolution (s 129(7)). Depending on the explanation provided, this notice may prompt affected persons to take enforcement action or apply for business rescue or liquidation. There are several good reasons why a board might decide against business rescue despite the company's being financially distressed: the company could negotiate individual contractual arrangements with some of its creditors, propose a s 155 compromise, or even place

itself in liquidation. As financial distress includes instances in which the company would only become commercially or factually insolvent within six months, it might even try to trade through its financial troubles without relying on any indulgence from its creditors.

(ii) Formalities after adoption of the resolution

Within five business days after filing the resolution to commence business rescue proceedings (or such longer time as the Commission may on application allow), the company must

- publish a notice of the resolution and its effective date, in the prescribed manner, to every affected person, and include with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
- appoint a business rescue practitioner who satisfies the requirements for appointment (set out in s 138), and who has consented in writing to being appointed (s 129(3)(a) and (b)).

The company must, within two business days after appointing the practitioner, file a notice of appointment and within five business days after doing this, publish a copy of the notice to each affected person (s 129(4)(a)–(b)).

Substantial rather than strict compliance with the publication requirement will suffice. In *Ex parte Van den Steen NO & others (Credit Suisse Group AG & another intervening)* 2014 (6) SA 29 (GJ) 36–7, a group of creditors was omitted from the publication to individual creditors, but as the information was made available to them in an alternative manner within the prescribed time periods, the court found that there was indeed compliance and that the resolution had not lapsed.

If the company fails to appoint a practitioner as required or breaches any of the above filing and notice requirements,

the resolution to begin business rescue proceedings lapses and becomes a nullity (s 129(5)(a)). But contrary to what was suggested in some decisions discussed in *Panamo Properties (Pty) Ltd & another v Nel & others* NNO 2015 (5) SA 63 (SCA) 70–1, the lapsing of the resolution does not retroactively erase the business rescue proceedings as if they never commenced. Instead, this lapsing is a ground on which the court may set aside the business rescue proceedings (s 130(1)(a)(iii); *Panamo Properties (Pty) Ltd & another v Nel & others* NNO (*supra*) 74–5). This distinction between the lapsing of the ‘resolution’ and the termination of the ‘proceedings’ is the only sensible way to reconcile these apparently conflicting provisions without making the ground superfluous.

Another consequence of the failure to adhere to the filing and notification formalities is that the company may not file another business rescue resolution for three months from the date on which the lapsed resolution was adopted, unless the court, on good cause shown, orders otherwise (s 129(5)(b)). This rule aims to prevent

the abuse of resolutions to obtain temporary relief against enforcement action through the general moratorium (as to which see 26.1).

(iii) The right of an affected person to object to voluntary business rescue

The Act allows an affected person to apply to court to set aside a business rescue resolution on the ground that

- there is no reasonable basis for believing that the company is financially distressed; or
- there is no reasonable prospect of rescuing the company; or

- the company has failed to comply with the relevant procedural requirements (s 130(1)(a)).

The court may grant the application on any of the grounds specified above, or on the ground that it is otherwise just and equitable to grant it (s 130(5)(a)). The Supreme Court of Appeal has ruled that the word 'or' in this section should be understood conjunctively as 'and' so that, rather than being a separate ground, it is a further requirement for setting aside the resolution when one of the listed grounds exists (*Panamo Properties (Pty) Ltd & another v Nel & others NNO (supra)* 75–6, confirmed in *Eravin Construction CC v Bekker NO & others* 2016 (6) SA 589 (SCA) 592–3).

An 'affected person' means a shareholder or creditor of the company; any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives (s 128(1)(a) *sv* 'affected person'; for further discussion of affected persons, see 27.4). A director who voted for the resolution is disqualified from bringing the application unless he satisfies the court that, in supporting the resolution, he acted in good faith on the basis of information that has since been found to be false or misleading (s 130(2)).

The application to set aside the resolution may be brought at any time before the adoption of a business rescue plan (s 130(1)(a)). The applicant must serve a copy of the application on the company and the Commission and notify every other affected person of the application in the prescribed manner (s 130(3)). Each affected person has a right to take part in the hearing of the application (s 130(4)).

Before making its decision, the court may give the business rescue practitioner time to prepare a report

indicating whether the company appears to be financially distressed or whether there is a reasonable prospect of rescuing it (s 130(5)(b)). On setting aside the resolution, the court may make any further necessary and appropriate order, including an order placing the company in liquidation and a costs order against any director who voted for the resolution when there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable (s 130(5)(c)). The orders mentioned in s 130(5)(b) do not form a closed list, and the court has a wide discretion to make any order as long as it is both necessary and appropriate (*Alderbaran (Pty) Ltd & another v Bouwer & others* 2018 (5) SA 215 (WCC) 229–30). The court can, for example, validate enforcement action taken contrary to the general moratorium (see 26.1.4(iii)) by a creditor who was not informed of the business rescue resolution (see *Alderbaran (Pty) Ltd & another v Bouwer & others (supra)* 230; *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others (supra)* paras 82–4).

When an order is sought on the ground that there is no reasonable prospect of

rescuing the company, the factors considered by the court form a mirror image of those relevant to an application for compulsory business rescue (*Finance Factors CC v Jayesem (Pty) Ltd* 2013 JDR 1901 (KZD) para 18; and see 25.3.2(iv) below). Ultimately, the same standard is applied whenever a court must decide whether the company qualifies for business rescue. The court does not ask whether the board had reasonable grounds when it adopted the resolution, but whether the applicant has shown that there is no reasonable prospect of rescue at the time when the application is heard (*Finance Factors CC v Jayesem (Pty)*

Ltd (supra) para 21). The applicant need not counter every conceivable plan. If a plan has already been proposed, it must be shown not to offer a reasonable prospect of rescue or otherwise that the basis advanced by the company does not reveal a reasonable prospect (*idem* para 22).

In considering whether it is just and equitable to set aside the resolution, the court makes a value judgement and may have regard to whether the directors adopted the resolution for a proper purpose (*Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others (supra)* paras 30 44 46ff 59 60–5; *Alderbaran (Pty) Ltd & another v Bouwer & others (supra)* 228–9).

25.3.2 Compulsory business rescue (court application)

(i) The application

An affected person (see 25.3.1(*iii*)) may apply to court for an order placing a company under supervision and commencing business rescue proceedings (s 131(1)). The court is the High Court with jurisdiction over the company, or a judge designated as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue, or a judge to whom the judge president has assigned the matter (s 128(1)(e)). An application may be brought at any time, except if the company has already adopted a voluntary business rescue resolution (s 131(1)).

The application may be made even if proceedings for the liquidation of the company have already commenced (s 131(6)). The term 'liquidation proceedings' refers not to a liquidation application but to the process of realizing assets and accounting to creditors, so that a business rescue application may be made at any time before the company's affairs have been completely wound up and it is

dissolved and deregistered (*Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA)). The time the company has been in liquidation may affect the prospects of rescue, especially if the company's business has been dormant for some time (*Van der Merwe & others v Zonnekus Mansion (Pty) Ltd (in Liquidation) & another (Commissioner for the South African Revenue Service & another intervening)* [2016] ZAWCHC 193 (19 December 2016) paras 56–8).

(ii) Preliminary formalities

The applicant must serve a copy of the application on the company and on the Commission and notify each other affected person in the prescribed manner (s 131(2)(a)–(b)). Regulation 124 of the Companies Regulations requires that affected persons also receive a copy of the application—a requirement more onerous than mere notification (cf *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd & another (Advantage Projects Managers (Pty) Ltd intervening)* 2011 (5) SA 600 (WCC) 605). Each affected person has the right to participate in the hearing of the application (s 131(3)).

Page 331

(iii) Application suspends liquidation proceedings

If liquidation proceedings have already been commenced by or against the company at the time the application for business rescue is made, the application has the effect of suspending the liquidation proceedings until the court has dismissed the business rescue application or, if the court grants the order applied for, until the end of the business rescue proceedings (s 131(6)).

The business rescue application is 'made' when it has been served on the Commission, the company, and the liquidator and notified to each affected person as required

by s 131(2) (*Standard Bank of South Africa Limited v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ) 62; *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC & others* 2013 (6) SA 141 (KZP) 151–2).

The meaning of the words 'liquidation proceedings' was uncertain until the Supreme Court of Appeal held that the suspension affects only the actions of the Master and the liquidator in realizing the company's assets with a view to distributing the proceeds to creditors (*GCC Engineering (Pty) Ltd & others v Maroos & others* 2019 (2) SA 379 (SCA) 384). The winding-up order has been granted and its legal consequences are not affected, and the liquidator continues to exercise control over the company's assets (*ibid*). The directors do not reacquire control over the company.

The position when a winding-up application is pending is uncertain. In *Absa Bank Limited v Summer Lodge* 2013 (5) SA 444 (GNP) para 11, it was held that the legal action to obtain a provisional or final order is not suspended. A winding-up order can thus be made even though the liquidator will be unable to give full effect to it. This outcome seems to accord with the approach of the Supreme Court of Appeal in *GCC Engineering (Pty) Ltd & others v Maroos & others* (*supra*). Recently, though, in *Kgoro Consortium (Pty) Ltd & another v Cedar Park Properties 39 (Pty) Ltd & others* 2022 JDR 1108 (SCA), the Supreme Court of Appeal appeared to contradict this approach when, in setting out the history of the business rescue application, it mentioned that the liquidation application had to be removed from the roll because of the lodging of the business rescue application (*idem* para 4).

(iv) Discretion of the court

The court may grant a business rescue order if it is satisfied that

- the company is financially distressed; or
- the company has failed to pay any amount due in terms of a public regulation or contract pertaining to employment-related matters; or
- it is otherwise just and equitable to do so for financial reasons; and
- there is a reasonable prospect for rescuing the company (s 131(4)).

A court may on its own initiative place a company under business rescue and appoint an interim practitioner during liquidation proceedings or proceedings to enforce any security against the company (s 131(7)). This provision accords with the legislative preference for business rescue proceedings (see 25.1). The concept 'liquidation proceedings' in this context refers to applications for compulsory liquidation.

Once the basic substantive requirements have been established, the court must still exercise its discretion by balancing relevant policy considerations (*Newcity Group (Pty) Limited v Pellow NO & others* [2014] ZASCA 162 (1 October 2014) para 23). This process entails a value judgement or a discretion in the loose sense based on the court's assessment of a diverse and contrasting range of factors (*Oakdene SCA* 548).

Page 332

The following factors could weigh against making an order:

- the company has no employees or only a few (*FirstRand Bank Limited v Normandie Restaurants Investments* 2016 JDR 2212 (SCA) para 24; *Ferrostaal GmbH & another v Transnet SOC Ltd & another* 2021 (5) SA 493 (SCA) 503–4; *Propspec Investments (Pty)*

- Ltd v Pacific Coast Investments 97 Ltd & another* 2013 (1) SA 542 (FSB) 548);
- the rehabilitation of the company is expected to extend over a protracted period of time (*FirstRand Bank Limited v Normandie Restaurants Investments (supra)* para 19; see also *Shiva Uranium (Pty) Limited (in Business Rescue) & another v Tayob & others* 2022 (3) SA 432 (CC) 447–8, where the Constitutional Court confirmed that business rescue is intended to be expeditious);
 - the treatment of creditors or classes of creditors under the proposed plan is unfair (*Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* 2017 (3) SA 74 (WCC) 84–6; *Ferrostaal GmbH & another v Transnet SOC Ltd & another (supra)* 504);
 - the company is embroiled in legal disputes or litigation that will detract attention from its rehabilitation (*Oakdene SCA* 554; *Finance Factors CC v Jayesem (Pty) Ltd* 2013 JDR 1901 (KZD) para 28);
 - there are onerous contracts or doubtful transactions that might be cancelled or set aside by a liquidator, who could exercise investigative powers under s 417 and 418 of the Companies Act 61 of 1973 if the company were liquidated (*Oakdene SCA* 554);
 - affected persons do not support business rescue proceedings (*Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* (*supra*) 92); and
 - the directors who guaranteed the company's debts will be the real beneficiaries of the plan (*DH Brothers Industries (Pty) Ltd v Gribnitz NO & others* 2014 (1) SA 103 (KZP) 133).

On granting the order, the court may appoint an interim practitioner nominated by the applicant affected person,

subject to ratification by the holders of a majority of independent creditors' voting rights at the first meeting of creditors (s 131(5); see 27.1.2(ii)). If the court dismisses the application, it may make any further necessary and appropriate order, including a liquidation order (s 131(4)(b)).

(v) Subsequent formalities and restriction on voluntary liquidation

A company that has been placed under supervision by the court must notify each affected person of the order within five business days (s 131(8)(b)) and may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended (s 131(8)(a)). It is interesting to compare this latter provision to s 129(6), which applies to companies that commence business rescue proceedings by means of a board resolution. Section 129(6) refers to a resolution to initiate liquidation proceedings, while s 131(8) refers to a resolution placing the company itself in liquidation. So although s 131(8) apparently prevents voluntary liquidation, s 129(6) also prevents a company from applying to court for its liquidation on the ground of a special resolution (see s 344(a) of the Companies Act 1973). This prohibition does not prevent the court from converting the business rescue into a liquidation as envisaged in Chapter 6 of the 2008 Act.

Page 333

25.3.3 Duration of business rescue proceedings

Business rescue proceedings commence when any of these events occurs:

- the company files a resolution to place itself under supervision;

- the company applies to court for permission to file another business rescue resolution within three months of the lapse of an earlier resolution as envisaged by s 129(5)(b);
- an affected person applies to the court for an order placing the company under supervision; or
- during the course of liquidation proceedings, or proceedings to enforce a security interest, the court makes an order placing the company under supervision (s 132(1)).

It seems obvious (although the Act does not expressly say so) that, in the second instance, the proceedings commence only once the company later files a resolution as permitted by the court. Similarly, in the third instance, the proceedings would only have commenced if the court granted the order applied for.

Business rescue proceedings end when any of these events occurs:

- the court sets aside the resolution or order that began the proceedings;
 - the court converts the proceedings into liquidation proceedings;
 - the practitioner files with the Commission a notice terminating the proceedings;
 - the business rescue plan that has been proposed is rejected and no affected person has taken steps to extend the proceedings; or
 - a business rescue plan has been adopted and the practitioner files a notice of substantial implementation of the plan (s 132(2)).
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Chapter 26

The effects of business rescue proceedings

Synopsis

- 26.1 General moratorium
 - 26.1.1 Purpose and duration of the moratorium
 - 26.1.2 Scope of the moratorium
 - 26.1.3 Proceedings expressly excluded from the moratorium
 - 26.1.4 Lifting of the moratorium
 - 26.1.5 Enforcement of a guarantee or suretyship given by the company
 - 26.1.6 Effect on time limits
- 26.2 Property interests
- 26.3 Employment contracts
- 26.4 Other contracts
- 26.5 Shares and other securities
- 26.6 Directors

26.1 The General moratorium

During business rescue proceedings

- no legal proceeding (including enforcement action) against the company, or in relation to any property belonging to or in the lawful possession of the company, may be commenced or proceeded with in any forum, except with the written consent of the practitioner or with the leave of the court and in

- accordance with any terms the court considers suitable (s 133(1)(a) and (b));
- a guarantee or suretyship undertaking by the company may not be enforced except with the leave of the court and in accordance with any terms that the court considers just and equitable in the circumstances (s 133(2)).

26.1.1 Purpose and duration of the moratorium

The commencement of business rescue proceedings results in an automatic temporary moratorium or stay on legal proceedings against the company. As is evident from the definition of 'business rescue' (see 25.2.2(i)), the temporary moratorium is one of the three pillars of the business rescue process, along with temporary supervision and the development and implementation of a business rescue plan.

The purpose of the moratorium is to afford the company a breathing space from litigation and its consequences so that the practitioner can focus his time and attention on restructuring the company (*Cloete Murray & another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) 441; *Chetty t/a Nationwide Electrical v Hart & another NNO* 2015 (6) SA 424 (SCA) 433–4 436). The moratorium also prevents the

Page 335

attachment and sale in execution of assets that the company requires for its business operations (*Knoop NO v Vorster NO* 2019 JDR 1206 (GJ) para 14).

The general moratorium endures for the entire period of business rescue (see s 132 and 25.8.8) and applies to all claims against the company, regardless of whether the cause or claim arose before or after the commencement of the proceedings (*SA Airlink v SAA (SOC) Limited & others*

[2020] ZASCA 156 (30 November 2020) paras 18–19). Clarity was thus provided after the question of the applicability of the moratorium to post-commencement causes of action had been raised but left unanswered in *Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) 852.

The moratorium is a temporary limitation on the third party's constitutional right of access to courts (s 34 of the Constitution of the Republic of South Africa, 1996). This limitation can still be justified by the purpose of business rescue proceedings (*Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* 2017 (4) SA 51 (WCC) 67). Yet the moratorium cannot be used to delay indefinitely the satisfaction of claims against the company (*Arendse & others v Van der Merwe & another NNO* 2016 (6) SA 490 (GJ) 493–4).

Business rescue proceedings are sometimes abused to exploit the protection of the moratorium (see *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others; Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd* [2020] ZAGPJHC 255 (14 August 2020) paras 60–5). But the mere fact that the board adopts a business rescue resolution to take advantage of the moratorium when a creditor is on the brink of taking enforcement action does not amount to abuse if the creditors as a whole stand to benefit from the proceedings (*Knoop NO v Vorster NO (supra)* para 13).

In addition to the automatic general moratorium, a business rescue plan can provide for a moratorium that will take effect when the plan is approved (s 150(2)(b)(i); and see 27.6.1).

26.1.2 Scope of the moratorium

(i) Legal proceedings and enforcement action

The expression 'legal proceedings' refers to formal dispute resolution proceedings in a forum such as a court or tribunal (*Cloete Murray & another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) 445). Arbitration proceedings also fall within the ambit of the moratorium (*Chetty t/a Nationwide Electrical v Hart & another NNO* 2015 (6) SA 424 (SCA) 433–4). The Supreme Court of Appeal remarked that, as arbitration can have the same negative effect on the company's business rescue as court proceedings, a narrow interpretation that restricts 'legal proceedings' to litigation in a public forum will not serve the purpose of the moratorium (*idem* 433–4).

The moratorium also applies to proceedings in the labour courts (*Marais & others v Shiva Uranium (Pty) Ltd (In Business Rescue) & others* (2019) 40 ILJ 177 (LC) 182–4; *Sondamase & another v Ellerine Holdings Ltd & another* [2016] ZALCCT 53 (22 April 2016); *contra National Union of Metal Workers of South Africa obo Members v Motheo Steel Engineering* [2014] ZALCJHB 315 (7 February 2014)).

The expression 'enforcement action' means formal proceedings ancillary to a court order: in other words, steps taken to enforce such an order (*Cloete Murray & another*

Page 336

NNO v FirstRand Bank Ltd t/a Wesbank (*supra*) paras 31–2; but see *Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) 853, where the same court describes enforcement action as proceedings to obtain (rather than give effect to) an order for specific performance of contractual obligations). Enforcement action includes not only the attachment of property under a court order but also the subsequent sale in execution of that property, even if attachment occurred before the commencement of the proceedings (*Cawood NO & others v*

Swanepoel t/a Reaan Swanepoel Attorneys & others [2015] ZAGPPHC 1042 (29 September 2015) para 28).

The moratorium does not place any limit on the normal (extra-judicial) enforcement of contractual rights, and it was not intended to interfere with contractual remedies such as the cancellation of a contract (*Cloete Murray & another NNO v FirstRand Bank Ltd t/a Wesbank* (*supra*) 445–6 447–8).

(ii) Against the company or its property

The general moratorium has the effect of a personal defence (defence *in personam*) in favour of the company (*Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* (*supra*) 853). It is not unconstitutional that only the company in business rescue is protected while proceedings may continue against third parties such as the company's sureties (*Business Partners Ltd v Tsakiroglou & others* 2016 (4) SA 390 (WCC) 394E–H 395E–I).

Section 133(1) applies to different scenarios: the first covers legal proceedings and enforcement action against the company, while the second relates to property belonging to or in the lawful possession of the company (*Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* (*supra*) 854). The first includes an application for the liquidation of the company (*BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others* 2017 (4) SA 592 (GJ) 608–9). In *Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* (*supra*), a prospective purchaser had paid a deposit into the company's bank account, but the sale did not take place. The court held that the second moratorium was not applicable (*idem* 854):

'The plain language of the words, "no legal proceedings in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with", limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue, or property unlawfully possessed by the company.'

This statement can be criticized: lawful possession (as an alternative to ownership) implies that the property belongs to someone else. Section 133(1) could be interpreted as also affording the company protection in relation to proceedings against the owner of such property: for example, when a mortgagee seeks to attach and sell property leased by the company because of the default of the mortgagor landlord. Courts have not yet had the opportunity to consider such cases. In *Griessel & another v Lizemore & others* 2016 (6) SA 236 (GJ), though, where shareholders litigated against a third party to recover property belonging to the company, the moratorium was found not to apply because the proceedings were not adverse to the company but rather for its benefit (*idem* 263).

(iii) Eviction and repossession proceedings

The moratorium has often been raised as an impediment to proceedings for the return of property that the company was holding in terms of a contract since cancelled by the other contracting party. Although the company is cited as the respondent in proceedings to evict the company from leased premises or to repossess property purchased under instalment sales, it is accepted that the fate of the proceedings is determined solely with reference to the alternative moratorium in relation to property. Once the underlying contract has been cancelled, the property is no longer in the lawful possession of the company, and the moratorium does not apply. So the consent of the practitioner or leave of the court is not required for an eviction order (*Kythera Court v Le Rendez-Vous Cafe CC & another* 2016 (6) SA 63 (GJ); *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd & others* 2016 (6) SA 501 (WCC); *BP Southern Africa (Pty) Ltd v Intertrans Oil SA*

(Pty) Ltd & others (*supra*)) or for a repossession order (*JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd & others* 2016 (6) SA 448 (KZD); *Firststrand Bank Ltd v Singh* 2015 JDR 2688 (GJ); *Madodza (Pty) Ltd v Absa Bank Ltd & others* [2012] ZAGPPHC 165 (15 August 2012)). The Supreme Court of Appeal accepted this to be the correct approach also where the possession became unlawful when a suspensive condition was not met and the contract thus never materialized (*Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd (supra)* 855).

(iv) Proceedings related to business rescue proceedings

There are conflicting decisions about the applicability of the moratorium to legal proceedings about the business rescue itself. In *Moodley v On Digital Media (Pty) Ltd & others* 2014 (6) SA 279 (GJ), an affected person brought an application about the manner in which the plan was being implemented. The court said that proceedings about the constituent elements of business rescue—the supervision of the company and the development and implementation of a business rescue plan—were not subject to the moratorium (*idem* 284). This interpretation was followed in *Hlumisa Investment Holdings (RF) Ltd v Van der Merwe NO* 2015 JDR 2231 (GP), where an order was sought against the practitioner in connection with his duty to consult with affected persons. The court remarked that proceedings against the business rescue practitioner are not covered by s 133(1) (*idem* para 17).

On the other hand, in *Absa Bank Limited v Naude NO & another* [2014] ZAGPPHC 181 (24 January 2014), the moratorium was said to apply to an application to set aside a business rescue resolution or to set aside the voting on a plan. In *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* 2017 (4) SA 51 (WCC), the court held that the

moratorium applies to proceedings on the implementation of a plan. The moratorium was also applied in the context of an application to compel the practitioner to file a notice of termination of the business rescue proceedings (*Airports Co SA Ltd v Spain NO & others* 2021 (1) SA 97 (KZD)).

26.1.3 Proceedings expressly excluded from the moratorium

The moratorium on legal proceedings does not apply to

- criminal proceedings against the company or any of its directors or officers (s 133(1)(d));
- proceedings against the company by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner (s 133(1)(f));

Page 338

- proceedings concerning any property or right over which the company exercises the powers of a trustee (s 133(1)(e));
- proceedings instituted as a set-off against any claim made by the company itself in any legal proceedings (s 133(1)(c)).

The reference to the company's exercising the powers of a trustee must be narrowly interpreted to include only instances where the company is administering property on behalf of another in a fiduciary capacity: for example, as an attorney, an estate agent, or a financial institution under the Financial Institutions (Protection of Funds) Act 28 of 2001 (*Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) 855–6).

The expression 'proceedings instituted as a set-off' against claims made by the company in legal proceedings appears to refer to counterclaims. (This is an unfortunate

choice of words because the term 'set-off' usually refers to the extinction of mutual obligations by operation of law (*Kritzinger & another v Standard Bank of South Africa* [2013] ZAFSHC 215 (19 September 2013).)

26.1.4 Lifting of the moratorium

Proceedings and enforcement action that fall within the scope of the moratorium can be commenced or continued only

- with the written consent of the business rescue practitioner (s 133(1)(a)); or
- with the leave of the court, in accordance with any terms it considers reasonable (s 133(1)(b)).

The consent of the practitioner and the leave of the court are independent alternatives: it is not necessary first to approach and obtain a refusal from the practitioner before approaching the court for leave (*Chetty t/a Nationwide Electrical v Hart & another NNO* 2015 (6) SA 424 (SCA) 438). Applying the definition of 'court' in s 128(1)(e), only the High Court can grant leave (*Marques & others v Group Five Construction (Pty) Ltd (Under Supervision) & others* (2020) 41 ILJ 677 (LC) 684).

(i) The court's discretion

The court has a wide discretion to grant leave for proceedings against the company. Leave should not be reserved for exceptional circumstances (*Arendse & others v Van der Merwe & another NNO* 2016 (6) SA 490 (GJ) para 29; *contra Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Limited* 2013 JDR 1019 (GSJ), which interpreted the discretion restrictively; see also *Booyesen v Jonkheer Boerewynmavery (Pty) Ltd & another* 2017 (4) SA 51 (WCC) 70, where the court remarked that 'unnecessary formalistic obstacles' in the path of granting leave could

frustrate the purposes of business rescue). The application must provide reasons for the lifting of the moratorium. In *SA Airlink v SAA (SOC) Limited & others* [2020] ZASCA 156 (30 November 2020), the applicant applied for leave while arguing that the moratorium did not apply to the matter. Leave was refused because there was no explanation of why the proceedings should be allowed (*idem* paras 17–21).

The standard for the exercise of the discretion is that the applicant must make out a triable case (*Arendse & others v Van der Merwe NO & another* (*supra*) 494). It is not

necessary to prove that success is more likely than not. Although this does not constitute a closed list, relevant factors may include

- the effect of the moratorium on the applicant compared to its effect on other stakeholders;
- the effect of the proceedings on the company's well-being and prospects of recovery; and
- whether leave will be an obstacle to the object and purpose of the business rescue proceedings (*Arendse & others v Van der Merwe NO & another* (*supra*) 497–8).

(ii) Separate or integrated application?

Courts have given different answers on whether leave should be applied for in a separate advance application or could be combined with the substantive proceedings instead. Separate applications for the lifting of the moratorium were required in *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd & others* 2015 (4) SA 485 (KZD) and *Mbunduzi Municipality v Uphill Trading 14 (Pty) Ltd* 2015 JDR 0702 (KZP). But this approach was regarded as 'overly technical' in *BP Southern Africa (Pty) Ltd v*

Intertrans Oil SA (Pty) Ltd & others 2017 (4) SA 592 (GJ) 598–9, where the court granted leave retroactively in an integrated application (see the order (*idem* 609)). Integrated applications for leave were also regarded as acceptable in *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another (supra)*; *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd & others*; *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd* [2020] ZAGPJHC 255 (14 August 2020); and *Nathan v Nathan* 2021 JDR 1710 (KZD).

(iii) Consequences of failure to obtain consent or leave

The moratorium is a procedural bar only. Accordingly, leave to commence or continue with proceedings is not a jurisdictional fact, and failure to obtain leave does not deprive the court of jurisdiction to hear a matter (*Chetty t/a Nationwide Electrical v Hart & another NNO (supra)* 435–6). Nor does this failure invalidate proceedings taken and orders granted without leave (*idem* 437; see also the full bench decision in *LA Sport 4x4 Outdoor CC v Broadsword Trading 20 (Pty) Limited* 2015 JDR 0405 (GP)).

When the court is asked to set aside an order that was obtained without the leave of the court, it will take the circumstances into account, including the fact of non-compliance with s 133(1). In *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd (supra)*, a creditor had obtained a provisional perfection order without consent or leave. But the company had acted in bad faith and failed to inform that creditor of the business rescue resolution that it had filed. In the circumstances, there was no justification for invalidating or staying the perfection order (paras 78–9).

26.1.5 Enforcement of a guarantee or suretyship given by the company

The enforcement of a guarantee or suretyship given by the company is a special case that applies to the exclusion of s 133(1) (*Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) 853). Enforcement can take place only with the leave of the court (s 133(2)). The court may grant leave in accordance with terms it considers just and equitable (s 133(2)).

The purpose of the court involvement is to protect the company in respect of obligations that it undertook to guarantee or secure the debts of others. The provision

Page 340

does not protect those who bound themselves as sureties or guarantors for the obligations of the company (*Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) 436–7; see also *Business Partners Ltd v Tsakiroglou & others* 2016 (4) SA 390 (WCC)). Business rescue proceedings do not affect the right to pursue sureties for the company (*New Port Finance Co (Pty) Ltd & another v Nedbank Ltd* 2016 (5) SA 503 (SCA) 508).

26.1.6 Effect on time limits

If any right to commence proceedings or otherwise assert a claim against the company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings (s 133(3)). The purpose is to protect the company's creditors (*Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* (SCA) [2021] 3 All SA 843 (SCA) 853). The suspension has the effect of extending the time period regardless of how long before the completion of prescription the business rescue ends. It must thus be distinguished from circumstances delaying the completion of prescription under the Prescription Act 68 of 1969.

This extension compensates to some extent for the delay in enforcement as a result of the moratorium.

26.2 Property interests

While a company is subject to rescue proceedings, it may dispose, or agree to dispose, of its property only

- in the ordinary course of its business;
- in a *bona fide* transaction concluded at arm's length for fair value approved in advance and in writing by the practitioner; or
- in a transaction contemplated by, and undertaken as part of, the implementation of an approved business rescue plan (s 134(1)(a)).

Other persons are prohibited from exercising any rights in respect of property lawfully in the possession of the company (irrespective of who owns the property), except to the extent that the practitioner consents in writing (s 134(1)(c)). The practitioner may not unreasonably refuse to consent, having regard to the purposes of business rescue, the circumstances of the company, and the nature of the property and the rights claimed in respect of it (s 134(2)). This provision supplements s 133(1), which prohibits the commencement or continuance of legal proceedings against any property lawfully in the possession of the company.

If another person is in lawful possession of any property owned by the company as a result of an agreement concluded in the ordinary course of the company's business before the business rescue began, that other party may, unless the agreement is suspended by the practitioner or cancelled by the court (as to which, see below), continue to exercise any right which the agreement confers in respect of the property (s 134(1)(b)).

To dispose validly of property subject to a security or title interest, the company must obtain the prior consent of the holder of the interest, unless the proceeds of the disposal would be sufficient to discharge the secured or protected debt in full (s 134(3)(a)). Having disposed of the property, the company must promptly pay the sale proceeds attributable to that property to the holder up to the amount of the company's indebtedness or else provide security to the reasonable satisfaction of the

holder for the amount of the proceeds (s 134(3)(b)). If the proceeds have not been paid over by the practitioner or secured to the creditor's satisfaction, the purchaser cannot obtain valid transfer (*Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ) 544).

The Supreme Court of Appeal remarked in *Diener NO v Minister of Justice & others* 2018 (2) SA 399 (SCA) 412:

'From the sections of ch 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to be diluted or undermined in any way. For instance, s 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of property that is held as security by another person, it may only do so with that person's prior consent, unless the proceeds of the disposal "would be sufficient to fully discharge the indebtedness protected by that person's security"; and then the company must pay the person promptly up to the company's indebtedness to him or her, or provide satisfactory security for that amount. This is consistent with what was held in *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* [2017 (3) SA 539 (GJ) para 18 p 544], namely that the "purpose and context" of business rescue "are not aimed at the destruction of the rights of a secured creditor".'

The practitioner may not use an income stream that has been ceded to a creditor except with that creditor's consent (*Louis Pasteur Holdings (Pty) Ltd & others v Absa Bank Ltd & others* 2019 (3) SA 97 (SCA) 104). Employees have no right to be paid in priority to a secured creditor who

obtained an asset in security before the commencement of business rescue proceedings—the protection granted by the encumbrance is ‘fully-proofed against all eventualities’ (*National Union of Metalworkers of SA & others v VR Laser Services (Pty) Ltd & others* [2020] 2 All SA 536 (GJ) para 36).

26.3 Employment contracts

During business rescue proceedings, employees of the company continue to be employed on the same terms and conditions as immediately before the proceedings except to the extent that changes occur

- in the ordinary course of attrition; or
- the employees and the company agree upon different terms and conditions in accordance with applicable labour laws (s 136(1)(a)).

Any retrenchments contemplated in a business rescue plan are subject to ss 189 and 189A of the Labour Relations Act 66 of 1995 and other applicable labour legislation (s 136(1)(b)).

Changes in the ordinary course of attrition include dismissals for misconduct or incapacity, resignations and retirements (*South African Airways (SOC) Ltd (in Business Rescue) & others v National Union of Metalworkers of South Africa & others* 2021 (2) SA 260 (LAC) 270). Retrenchments during business rescue proceedings can take place only if they are contemplated in a business rescue plan. This rule means that the consultation process required under the Labour Relations Act 66 of 1995 cannot commence until, at the very least, a draft plan has been presented that envisages retrenchments as one of its elements (*National Union of Metal Workers of South Africa obo Members & another v South African Airways (SOC) Limited (In business rescue) & others* 2020 (7) BCLR 888 (LC), confirmed on

appeal in *South African Airways (SOC) Ltd (in Business Rescue) & others v*

National Union of Metalworkers of South Africa & others (supra), where the Labour Appeal Court remarked that the purpose of s 131 is to protect employees from retrenchment before the publication of a plan (*idem* 270–1).

26.4 Other contracts

Contracts are fundamentally important to business operations, and the absence of continuing contracts could signal that there is no reasonable prospect of rescue (*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA) 205–6 214).

As a general principle, the commencement of business rescue proceedings has no effect on the continuance of uncompleted contracts. Each party remains liable to perform outstanding obligations and is entitled to performance from the other. This position corresponds with the basic rule in sequestration and liquidation proceedings (*Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) 27–8; see 7.2.1). However, in insolvency proceedings the existence of the *pari passu* or equal treatment of creditors principle affects the enforceability of the insolvent's obligations. This principle does not apply in business rescue proceedings. Instead, the practitioner is given special statutory powers in respect of contracts other than employment contracts or contracts to which s 35A (transactions on market infrastructure; see 7.8) or s 35B (agreements providing for termination and netting; see 7.9) of the Insolvency Act would apply if the company were liquidated (s 136(2)(a) read with s 136(2A)(b)(ii)).

For the duration of business rescue proceedings, then, the business rescue practitioner may suspend, entirely, partially or conditionally, any agreement or provision of an agreement to which the company was a party at the commencement of the proceedings (s 136(2)(a)). This power applies despite any agreement to the contrary (*ibid*). When the practitioner exercises this power, the other party to the agreement may assert only a claim for damages against the company (s 136(3)). The practitioner may also apply urgently to the court for the complete, partial or conditional cancellation of any obligation due by the company, on terms that are just and reasonable in the circumstances (s 136(2)(b)).

If the practitioner suspends a provision relating to security granted by the company, the creditor is still entitled to be regarded as a secured creditor when the company wishes to dispose of the property given as security (s 136(2A)(c)). As s 136(2) allows the suspension of outstanding obligations of the company only, this provision apparently envisages the situation in which the company has an obligation in respect of the finalization of the security. Section 136(2) cannot apply to the typical situation in which a security arrangement such as a cession of book debts is already in place: there is nothing left that can be suspended (*BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others* 2017 (4) SA 592 (GJ) 602–3). The cessionary is entitled to all future payments of the ceded debt, and there is no way for the practitioner to prevent this consequence except with the consent of the cessionary or by paying the secured creditor in full (*Louis Pasteur Holdings (Pty) Ltd & others v Absa Bank Limited & others* 2019 (3) SA 97 (SCA) 104).

The special arrangement in s 136(2) can apply only when there is at least one obligation of the company that has not yet fallen due: ie, a future obligation (*Homez Trailers and*

(27 September 2013) para 25; *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others (supra)* 602–3 607–8). This is often the case in continuing contracts with divisible performance such as contracts of lease and instalment transactions. Where the company is already in default, the other party's right to enforce that obligation is subject only to the moratorium on legal proceedings (*Kritzinger & another v Standard Bank of South Africa* [2013] ZAFSHC 215 (19 September 2013) paras 54–5; see 26.1.2). The consequences of a suspension are these:

- Suspension of the company's obligation means only that the other party cannot demand specific performance of that obligation. Instead, the other party must be content with a claim for damages (*Cloete Murray & another NNO v Firststrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) 446–7; 178 *Stamfordhill CC v Velvet Star Entertainment CC* 2015 JDR 0720 (KZD) para 27: 'The so-called suspension of the lease cannot amount to anything more than the BRPs' right not to be compelled to perform in terms of the contract'). The 'residual law of contract' remains unaffected (*BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others (supra)* 601).
- It is uncertain whether the damages claim should be regarded as a pre-commencement claim or as a post-commencement claim against the company. Although it arises after the commencement of the business rescue proceedings and as a result of the practitioner's exercise of a statutory power, it is suggested that the damages claim should rank as a pre-commencement

claim because there is no provision for the ranking of such claims in s 135 (see 27.3.2).

- The practitioner cannot force the other contracting party to continue performing any obligations that have been undertaken in exchange for the suspended company obligation. This is because unless the practitioner tenders the company's counter-performance, the other party may rely on the principle of reciprocity and withhold performance under the *exceptio non adimpleti contractus* (the exception of the unfulfilled contract) (*BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others (supra)*). In a contract of lease, for example, the payment of monthly rent is reciprocal to continued occupation, and the company is not entitled to continued occupation free of charge (*idem* 601). For this reason, the blanket suspension by the practitioner of all the company's future obligations has been described as the burning of commercial bridges (*idem* 605). Although a court could temper the strict application of the *exceptio* (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 415; *Smith v Van den Heever & others* 2011 (3) SA 140 (SCA) 143–4), this possibility has not been considered in relation to business rescue proceedings. For further reading about the *exceptio* in relation to business rescue, see Van der Linde 2017 *TSAR Liber Amicorum* – Essays in Honour of JC Sonnekus 218.
- It is uncertain whether the contract can be cancelled on the basis of the company's non-performance of a suspended obligation. In *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others (supra)*, the court hinted that this step might be possible if the breach was material and the contractual notice requirements were satisfied (*idem* 601). However, a remark in passing by the Supreme Court of Appeal

indicates that suspension probably does not justify cancellation (*Cloete Murray & another NNO v FirstRand Bank Ltd t/a Wesbank (supra)* 446–7; see also *Kythera Court v Le Rendez-Vous Cafe CC & another* 2016 (6) SA 63 (GJ) 67). The Act

provides specifically that the other party may assert a claim ‘only’ for damages (s 136(3)), and, although cancellation is not typically regarded as asserting a claim, the express inclusion of damages in the provision means that the intention could have been to regulate the other party’s remedies for breach of contract (specific performance, damages and cancellation) comprehensively.

- The other contracting party may still cancel the contract for a material breach of the company’s unsuspended obligations, regardless of whether the breach occurred before or after the commencement of the proceedings and regardless of whether cancellation steps began before or after the commencement of business rescue (*Cloete Murray & another NNO v FirstRand Bank Ltd t/a Wesbank (supra)*; *178 Stamfordhill CC v Velvet Star Entertainment CC (supra)* paras 26–7; *Schickerling NO v Chickenland (Pty) Ltd* 2016 JDR 0738 (GP)). Suspension cannot cure existing default.
- The other contracting party may also exercise any contractual right to terminate the contract by notice, such as a bank’s right to terminate overdraft or other bank facilities (*Kritzinger & another v Standard Bank of South Africa (supra)*; *Firststrand Bank Ltd v Singh (supra)* para 64; *Homez Trailers and Bodies (Pty) v Standard Bank of South Africa (supra)*). Even contractual cancellation rights that are triggered by

the mere commencement of the business rescue proceedings may be exercised (see *Firststrand Bank Ltd v Singh (supra)* paras 54–8, where the court remarked that a cancellation clause referring to judicial management could be relied on as if it referred to business rescue). See also *Homez Trailers and Bodies (Pty) v Standard Bank of South Africa (supra)* para 25, where business rescue was regarded as evidence of several of the stipulated conditions that would justify the termination of the contract. It is fairly common for corporate rescue provisions in other jurisdictions to outlaw these *ipso facto* clauses (clauses becoming applicable ‘by that very fact’—in this context by the commencement of proceedings, without regard to whether the company has defaulted on any obligation) because these clauses may reduce the prospects of rescue.

26.5 Shares and other securities

During business rescue proceedings, an alteration in the classification or status of a company’s issued securities is invalid unless it takes place

- by way of a transfer of the securities in the ordinary course of business; or
- in terms of a court order; or
- under an approved business rescue plan (s 137(1)).

It is not clear whether, in determining whether a transfer of securities took place in the ordinary course of business, the motives of the transferor and transferee and the general pattern of transfers in the company are relevant factors.

The meaning of the expression ‘classification and status’ of securities in this provision is uncertain. Although ‘classification’ usually refers to the division of shares to which specific preferences, rights and other terms attach

(s 36(1)–(2)), and ‘status’ depends on whether shares are issued and outstanding or authorized but unissued (s 35(5)), the first exception implies that a transfer of a share by an existing shareholder would affect that share’s status and classification, but this is not the

case. It is submitted that the exception was inserted to provide certainty about share transfers rather than to introduce a different meaning of classification and status.

When the classification and status of the company’s securities are changed in a business rescue plan, a vote by the holders of the securities on the plan is required to approve the changes (s 152(3)(c); see 27.6.3).

26.6 Directors

As will be seen in chapter 27, for the duration of business rescue proceedings the practitioner has full management control of the company in substitution for its board and management (s 140(1)(a)). During this period, each director of the company

- must continue to exercise the functions of director, subject to the authority of the practitioner;
- has a duty to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so; and
- must attend to the requests of the practitioner at all times and provide the practitioner with any information about the company’s affairs as may reasonably be required (s 137(2)–(3)).

The directors should not be running and controlling the business rescue proceedings while the practitioner adopts a passive attitude (*Booyesen v Jonkheer Boerewynmakery*

(Pty) Ltd & another 2017 (4) SA 51 (WCC) 77–9). The proper interpretation of s 137(2) depends on the distinction between the ‘functions of a director’ and the ‘management control’ over the company (*Ragavan & others v Optimum Coal Terminal (Pty) Ltd & others* 2022 (3) SA 512 (GJ) 524). The expression ‘functions of a director’ means the governance or internal functions in the company, including activities such as presenting the annual financial statements, resolving to issue shares, convening shareholder meetings, proposing shareholder resolutions, and holding board meetings (*idem* 515). These functions are subject to the practitioner’s authority, whereas the management functions, which concern the external functions of the company, may be exercised by directors only when the practitioner expressly instructs them to exercise that function. The practitioner’s acquiescence will not suffice (*Van Jaarsveld NO v Q-Civils (Pty) Ltd* 2018 JDR 0977 (FB) para 23). As the court explained (*idem* para 21):

‘Business rescue is aimed at limiting the powers of the people who played a role in plunging the company into the position it finds itself in. The legislature gives the directors constricted powers so as to afford the practitioner enough room to investigate the financial position of the company. It can never be business as usual once the company has been placed under business rescue.’

During business rescue proceedings, the company is represented by the practitioner, and a director cannot act on behalf of the company in opposing an application for the liquidation of the company (*idem* para 22). In *Ragavan & others v Optimum Coal Terminal (Pty) Ltd & others* (*supra*), the company in business rescue was a creditor of another company that was also in business rescue. The court had to decide whether the company’s vote as an affected person should be exercised by its directors or the business rescue practitioner. The court held that the term ‘management functions’ should be given a wide meaning (*idem* 524) and that exercising the right to vote on another company’s

business rescue plan was a management function because it formed part of

debt collecting (*idem* 523). But the provisions of the Act must always be interpreted in their context: in *Shiva Uranium (Pty) Ltd (in Business Rescue) & another v Tayob & others* 2022 (3) SA 432 (CC), the Constitutional Court found that the right of the company under s 139(3) to appoint a replacement business rescue practitioner had to be exercised on behalf of the company by its board of directors (*idem* 446 448).

If the board of directors, or one or more directors, purports to take any action on behalf of the company that requires the practitioner's approval, the action is void unless he approves it (s 137(4)).

A director remains bound by the duty to disclose personal financial interests or those of a related person as required by s 75 (s 137(2)(c)). But he is relieved from the duties of a director set out in s 76 and from most liabilities under s 77, provided he acts under the authority and according to the instructions or direction of the practitioner (s 137(2)(d)). The liabilities for which a director remains liable under s 77 are in respect of loss sustained by the company as a result of

- acting on behalf of the company despite knowing that he lacks authority (s 77(3)(a));
- acquiescing in the carrying on of the company's business despite knowing that it is being conducted recklessly, with gross negligence, or with intent to defraud or for a fraudulent purpose (s 77(3)(b) read with s 22(1)); or
- being a party to an act or omission knowing that it is calculated to defraud a creditor, employee or

shareholder of the company or that it has another fraudulent purpose (s 77(3)(c)).

The directors are obliged to co-operate with and assist the practitioner. In *Klopper NO v Ragavan* 2018 JDR 1258 (GJ), the business rescue practitioners of a group of companies obtained an order instructing the directors to co-operate with them and to allow them access to the company's offices (*idem* para 20). In particular, the directors are bound to

- deliver to the practitioner the books and records in their possession that relate to the company's or corporation's affairs;
- inform the practitioner of the whereabouts of other books and records; and
- provide the practitioner with a statement of the company's affairs within five business days after the commencement of business rescue proceedings (or within such extended time allowed by the practitioner) (s 142(1)–(3)). The minimum content of the statement of affairs is prescribed by s 142(3).

The practitioner may apply to court for an order removing a director from office on the ground that

- he has failed to comply with a requirement of Chapter 6; or
 - through an act or omission, he has impeded or is impeding the practitioner's exercise of his functions or powers, his management of the company, or the development and implementation of a business rescue plan (s 137(5)).
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Chapter 27

Conduct of business rescue proceedings

Synopsis

- 27.1 The business rescue practitioner
 - 27.1.1 Qualifications
 - 27.1.2 Appointment
 - 27.1.3 Removal and replacement
 - 27.1.4 General functions and duties
 - 27.1.5 Remuneration
- 27.2 Investigation of affairs of company
- 27.3 Post-commencement financing
 - 27.3.1 Power to obtain secured and unsecured financing
 - 27.3.2 Ranking of post-commencement claims
- 27.4 Rights of affected persons
 - 27.4.1 Employees
 - 27.4.2 Creditors
 - 27.4.3 Securities holders
- 27.5 Meetings and committees
 - 27.5.1 First meeting of creditors
 - 27.5.2 First meeting of employees' representatives
 - 27.5.3 Functions, duties and membership of committees
- 27.6 The business rescue plan
 - 27.6.1 Content of plan
 - 27.6.2 Publication of plan
 - 27.6.3 Meeting to consider and vote on plan

27.6.4	Legal effect of plan
27.6.5	Implementation of plan
27.6.6	Amendment of an adopted plan
27.6.7	Non-adoption of plan

27.1 The business rescue practitioner

The temporary supervision of the company by an independent practitioner who will manage its affairs and develop a business rescue plan is a central pillar of business rescue proceedings (s 128(1)(b)).

Page 348

27.1.1 Qualifications

For a person to be appointed as a practitioner, he must be

- a member in good standing of a legal, accounting or business management profession accredited by the Commission; and
- licensed as such by the Commission (s 138(1)(a) and (b)).

The Minister is empowered to make regulations prescribing minimum qualifications for practitioners and laying down standards and procedures to be followed by the Commission in carrying out its licensing functions (s 138(3); see regs 126–127). Based on their experience, practitioners are classified into three categories:

- senior practitioners, who may be appointed for any company;
- experienced practitioners, who may be appointed for small or medium companies or as assistants to a senior practitioner for a large or state-owned company; and
- junior practitioners, who may be appointed for small companies or as assistants to an experienced or senior

practitioner (reg 127(3)–(5)).

The classification of companies into small, medium and large depends on their public interest score (reg 127(2)(b)). This score depends on the company's turnover, number of employees, number of beneficial holders of its shares and other securities, and its total third party liability (reg 26(2)).

A person may not be appointed as a practitioner if

- he is subject to a probation order as a director or disqualified from acting as a director of the company (s 138(1)(c) and (d)); or
- he has a relationship with the company that would lead a reasonable and informed third party to conclude that his integrity, impartiality or objectivity is compromised, or he is related to someone who has such a relationship with the company (s 138(1)(e) and (f)).

27.1.2 Appointment

(i) Voluntary business rescue

In a voluntary business rescue, a practitioner is appointed by the company. This appointment must be made within five business days of the filing of the resolution, and the practitioner must consent in writing (s 129(3)(b)). A notice of the appointment must be filed within two business days of the appointment (s 129(4)(a)), and a copy of the notice must be published to each affected person within five business days of its filing (s 129(4)(b)).

An affected person is entitled to apply to court for an order

- setting aside the appointment of the business rescue practitioner because
 - he does not qualify for the position under s 138;

- he is not independent of the company or its management; or
- he lacks the necessary skills, having regard to the company's circumstances (s 130(1)(b)); or
- requiring the business rescue practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons (s 130(1)(c)).

This application can be made at any time before the adoption of the business rescue plan (s 130(1)). After that, the business rescue practitioner can still be removed under

Page 349

s 139(2) if his conduct during the implementation phase of the plan warrants this removal (*Shiva Uranium (Pty) Limited (in Business Rescue) & another v Tayob & others* 2022 (3) SA 432 (CC) 446–7; see 27.1.3 below).

If the court sets aside the appointment of the practitioner, it must appoint an alternative practitioner who qualifies for appointment and who is recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing (s 130(6)(a)). If a practitioner appointed under s 130(6)(a) resigns, the company's board, not the court, must appoint a replacement as envisaged in s 139(3) (*Shiva Uranium (Pty) Limited (in Business Rescue) & another v Tayob & others (supra)* 445). The directors need not be authorized by the business rescue practitioner in terms of s 137(2) to make this appointment because it is not a management function (*Tayob & another v Shiva Uranium (Pty) Ltd & others* [2020] ZASCA 162 (8 December 2020) para 18).

(ii) Compulsory business rescue

The court that makes a compulsory business rescue order must appoint a business rescue practitioner who

- satisfies the requirements for appointment; and
- has been nominated by the affected person who applied for the business rescue order (s 131(5)).

The appointment must be ratified by the holders of a majority of the voting interests of the independent creditors at the first meeting of creditors (s 131(5)).

27.1.3 Removal and replacement

The court may remove a practitioner from office following an objection to his appointment in the case of a business rescue resolution (s 139(1) read with s 130(1)(b) and (c)) or otherwise on any of these grounds (s 139(2)):

- incompetence or failure to perform the duties of a practitioner of the particular company;
- failure to exercise the proper degree of care in the performance of his functions;
- engaging in illegal acts or conduct;
- a conflict of interest or lack of independence;
- the fact that he no longer satisfies the requirements for appointment as a practitioner; or
- the fact that he is incapacitated and unable to perform the functions of his office and unlikely to regain that capacity within a reasonable time.

The existence of one or more of the above grounds for removal must be proved on a balance of probabilities. The existence of one of the grounds must be inferred from primary facts and cannot be based on conjecture and speculation (*Knoop NO & another v Gupta & another* 2021 (3) SA 88 (SCA) 96 121ff). The court may exercise its discretion to remove the business rescue practitioner once a ground has been established (*idem* 95).

Removal will not be ordered lightly. The primary consideration is whether stakeholders' interests will potentially be prejudiced if the practitioner remains in office (*idem* 95–6; see also *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA) 206–7 207–8).

A failure to adhere to prescribed time limits for administrative steps does not point to incompetence (*Absa Bank Limited v Naude NO & another* [2014] ZAGPPHC 181 (24 January 2014)).

If a practitioner dies, resigns or is removed from office, the company or creditor who nominated him must appoint a new practitioner (s 139(3)). Although this provision refers only to a nominating 'creditor', it should be understood as the nominating affected person because creditors are not the only possible applicants (*Shiva Uranium (Pty) Limited (in Business Rescue) & another v Tayob & others* 2022 (3) SA 432 (CC) 443). In voluntary proceedings, once the company has made a new appointment, any affected person may apply to court in terms of s 130(1)(b) or (c) to set aside the new appointment or to order that the practitioner must provide security (s 139(3)).

A practitioner's authority automatically ends when the business rescue proceedings end (*Commissioner for the South African Revenue Service v Primrose Gold Mines (Pty) Ltd & others* [2016] ZAGPPHC 737 (23 August 2016) para 17 (filing of a termination notice under s 153); *The Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd* 2021 JDR 1238 (KZP) (no steps taken after rejection of the plan)).

27.1.4 General functions and duties

During a company's business rescue proceedings, the practitioner has full management control of the company in substitution for the incumbent board and management (s 140(1)(a)). He should be more than a nominal figurehead and must be actively involved in the proceedings and the day-to-day management of the company (*Booyesen v Jonkheer Boerewynmavery (Pty) Ltd & another* 2017 (4) SA 51 (WCC) 77–9; see also *Alderbaran (Pty) Ltd & another v Bouwer & others* 2018 (5) SA 215 (WCC) 228 236–7, where the court ordered a passive practitioner to explain why he should be allowed to claim remuneration).

The practitioner may delegate powers and functions to directors or other persons who formed part of management, remove from office any member of that management, and appoint persons as part of management, whether to fill a vacancy or not (s 140(1)(b); see also s 140(2)).

As soon as possible after his appointment, the practitioner must inform all relevant regulatory authorities having authority in respect of the activities of the company that the company has been placed under business rescue proceedings and that he has been appointed as practitioner (s 140(1A)). The most important functions of the practitioner are to investigate the affairs of the company and to develop and implement a business rescue plan (see below). No person is entitled, as against the practitioner, to retain possession of or assert a lien over any books or records of the company unless those books or records are in the lawful possession of that person and he has made copies available to the practitioner or afforded the practitioner a reasonable opportunity of inspecting the books or records concerned (s 142(4)).

If the business rescue proceedings have not ended within three months after commencement or within a longer period allowed by the court, the practitioner must

- prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the end of the proceedings; and
- deliver the report and each update to every affected person as well as to the court, if

the proceedings have been the subject of a court order, or the Commission in any other case (s 132(3)).

The practitioner is an officer of the court (s 140(3)(a)), so a fairly high standard of integrity is expected of him (*Knoop NO & another v Gupta & another* 2021 (3) SA 88 (SCA) 102–3; *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA) 206–8). He is subject to the duties and liabilities of a director under ss 75 to 77 (s 140(3)(b)). In relation to other conduct, he is liable only for gross negligence in the exercise of his powers and is not liable for any act or omission in good faith (s 140(3)(c)). In *Van den Heever NO v Van Tonder* 2021 JDR 2612 (GJ), a full bench of the Johannesburg High Court held that the director relief provision in s 77(9) applies to a business rescue practitioner not only when he is exercising the powers of a director but also in relation to the functions of a practitioner (paras 21ff and 53ff). The court may relieve the practitioner from liability for breaches of his duties if he acted honestly and reasonably or if it would be fair to excuse him (s 77(9)).

If business rescue proceedings are superseded by an order placing the company in liquidation, the practitioner may not be appointed as the liquidator of the company (s 140(4)).

27.1.5 Remuneration

The practitioner is entitled to remuneration and expenses according to a prescribed tariff (s 143(1)). The remuneration tariff is based on the size of the company as classified under reg 127(2) and consists of an hourly rate subject to a maximum daily fee:

- R1 250 per hour subject to a maximum of R15 625 per day in the case of a small company;
- R1 500 per hour subject to a maximum of R18 750 per day in the case of a medium company;
- R2 000 per hour subject to a maximum of R25 000 per day in the case of a large company or a state-owned company (reg 128(1)).

The expenses include disbursements made for actual costs incurred and expenses incurred to the extent that they are reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the business rescue proceedings (reg 128(3)). These disbursements can be claimed in addition to the remuneration. They include expenses in respect of advisers appointed to help the practitioner conduct the proceedings (*Murgatroyd v Van den Heever & others NNO* 2015 (2) SA 514 (GJ) 523–4).

A practitioner may also agree with the company for further remuneration to be calculated on the basis of a contingency related to

- the adoption of a business rescue plan, the adopting of such a plan within a particular time, or the inclusion of any particular matter in such a plan; or
- the attainment of any particular result or combination of results relating to the business rescue proceedings (s 143(2)).

To be binding on the company, an additional remuneration agreement must be approved, at a meeting called to consider the proposed agreement, by the following persons:

- the holders present and voting of the majority of the independent creditors' voting interests; and

- the holders present and voting of the majority of the voting rights of shares entitling the shareholder to a portion of the residual value of the company on winding-up (s 143(3)).

A creditor or shareholder who voted against adopting the agreement may apply to court for an order setting it aside because it is not just and equitable or provides for remuneration that is unreasonable having regard to the financial circumstances of the company (s 143(4)). This application must be brought within ten business days of the date of voting on the proposal (*ibid*).

The requirements for additional contingency remuneration apply only where the company will become obliged to pay it. Section 143 does not regulate or prevent the practitioner from accepting a success fee negotiated with a third party (*Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) 40).

The practitioner's claim for remuneration and expenses ranks ahead of all secured and unsecured claims (s 143(5); see also s 135(3) and 27.3.2). The 'secured and unsecured claims' in s 143(5) refer only to post-commencement finance claims (the claim retains this preference if business rescue is superseded by a winding-up order, but then the claim ranks behind the costs of liquidation (s 135(4)). The claim is not entitled to a so-called super preference over pre-commencement secured claims and the proceeds of secured assets, as the words 'all secured and unsecured claims' in s 143(5) refer to claims in respect of post-commencement finance (*Diener NO v Minister of Justice & others* 2018 (2) SA 399 (SCA) 415–16, confirmed by the Constitutional Court in *Diener NO v Minister of Justice and Correctional Services & others* 2019 (4) SA 374 (CC)).

27.2 Investigation of affairs of company

The first major task of the practitioner, which he must undertake as soon as practicable after his appointment, is to investigate the company's affairs, business, property and financial situation, and having done so, to consider whether there is any reasonable prospect of the company being rescued (s 141(1)). If the practitioner concludes that there is no such prospect, he must inform the court, the company and all affected persons in the prescribed manner and apply to the court for an order discontinuing the business rescue and commencing liquidation (s 141(2)(a)). If he concludes that there are no longer reasonable grounds for believing that the company is financially distressed, he must inform the court, the company and all affected persons in the prescribed manner and apply to court for an order terminating the business rescue, if the process was initiated or confirmed by a court order, or otherwise file a notice of termination of the business rescue proceedings (s 141(2)(b)).

If the practitioner concludes that there is evidence of voidable transactions, or a failure by the company or any director to perform any material obligation relating to the company, he must take any necessary steps to rectify the matter and may direct management to take appropriate steps (s 141(2)(c)(i)). As ss 29 to 31 of the Insolvency Act do not apply to business rescue proceedings (cf *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2012 (3) SA 273 (GSJ) 290; *Engen Petroleum Ltd v Multi Waste (Pty) Ltd & others* 2012 (5) SA 596 (GSJ) 598 602), the reference to 'voidable transactions' apparently covers only transactions that are voidable under the principles of contract law. If there is evidence of reckless

trading, fraud or any other contravention of the law governing the company, the practitioner must forward the evidence to the appropriate authority for investigation and prosecution and direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company (s 141(2)(c) (ii)).

After completing this investigation into the company's affairs, the practitioner must continue monitoring the situation. He is required to take the appropriate steps as outlined above if 'at any time during [the] business rescue proceedings' he concludes that there is no reasonable prospect of the company being rescued, or that the company is no longer financially distressed, or that there is evidence of voidable transactions or unlawful conduct (s 141(2)(a)).

27.3 Financing during business rescue proceedings

27.3.1 Power to obtain secured and unsecured financing

During business rescue proceedings, a company may obtain financing, secured if necessary by any of the company's assets which are not otherwise encumbered (s 135(2)). Post-commencement financing may well be essential to the success of business rescue proceedings but difficult to arrange (Bradstreet (2011) 128 *SALJ* 352 359).

Company employees' claims for salary, expenses and other employment-related matters that have become due and payable during the business rescue proceedings and remain unpaid are treated as a form of post-

commencement financing (s 135(1)). These claims enjoying post-commencement financing status include bonuses, commissions and other incentive payments due to employees (*Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* 2017 (4) SA 51 (WCC) 75).

Although post-commencement remuneration falling due to employees is expressly classified as post-commencement finance, the Act is silent on the position of post-commencement debts falling due under other continuing contracts with divisible performance such as contracts of lease. In *South African Property Owners Association v Minister of Trade and Industry & others* 2018 (2) SA 523 (GP), the applicant applied unsuccessfully for a declaratory order that unpaid rental was either post-commencement financing or formed part of the costs of the business rescue proceedings (*idem* 528–9).

27.3.2 Ranking of post-commencement claims

The claims of employees in respect of the period after the commencement of business rescue rank equally and have preference over the claims of creditors (whether secured or not) who provided other post-commencement financing to the company (s 135(1) read with s 135(3)(a)). All other claims in respect of post-commencement financing rank after the practitioner's claim for remuneration and expenses and other claims arising out of the costs of the business rescue proceedings (s 135(3)). The claims of creditors who provide such financing rank in the order in which they were incurred and have preference over all unsecured claims against the company (s 135(2) read with s 135(3)(b)).

If the business rescue proceedings are superseded by a liquidation order, the preferences described here continue to apply, but the claims then rank below the costs of liquidation (s 135(4)). It is perhaps anomalous that these preferences outrank costs of execution under s 98 of the

Insolvency Act (see 16.3.2 regarding the ranking of claims against the free residue). As mentioned above, the practitioner's claim does not enjoy a

'super-preference' (*Diener NO v Minister of Justice & others* 2018 (2) SA 399 (SCA) 415–16, confirmed by the Constitutional Court in *Diener NO v Minister of Justice and Correctional Services & others* 2019 (4) SA 374 (CC)).

Considerable confusion about the ranking of claims during business rescue arose from remarks made in passing in *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Limited* 2013 JDR 1019 (GSJ) para 21, setting out a proposed ranking of all pre-commencement and post-commencement claims against the company. These remarks were repeated by the same judge in *Redpath Mining South Africa (Pty) Limited v Marsden NO* 2013 JDR 1410 (GSJ) para 60. This ranking in *Merchant* and *Redpath* did not accord with s 134 and s 135, though, and failed to give effect to the rights of secured creditors because it ignored the fact not only that secured creditors are entitled to satisfaction out of the proceeds of particular assets but also that a business rescue plan must set out the ranking of claims included in the plan (s 150(2)(b)(v)).

In *National Union of Metalworkers of SA & others v VR Laser Services (Pty) Ltd & others* [2020] 2 All SA 536 (GJ), the company's employees objected to the payment of a secured creditor above their post-commencement finance claims. The employees argued that their claims ranked ahead of secured claims and should be paid first from the security proceeds. This assertion relied on the ranking set out in *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty)*

Limited (supra), which was apparently also used as the basis for the plan (*National Union of Metalworkers of SA & others v VR Laser Services (Pty) Ltd & others (supra)* 542 553). The court found that the practitioners acted unlawfully when they elevated the employees' claims over the secured pre-commencement claims (*idem* 553). Section 135(3) does afford employees priority over secured post-commencement finance claims, but pre-commencement security is fully protected by s 134(3) (on property interests, see 26.2) and the common law (*idem* 553). The court explained that debts arising after the commencement of the process are categorized as post-commencement financing and that only their ranking is governed by s 135 (*idem* 551). The interpretation in the *VR Laser Services* case accords with the provisions of the Act and with general principles.

27.4 Rights of affected persons

The Act defines an affected person as a shareholder or creditor of the company, any registered trade union representing employees of the company, and if any employees are not represented by a registered trade union, also each of those employees or their respective representatives (s 128(1)(a)).

Although the different categories of affected persons enjoy the same right to be notified of important events in the business rescue process, to participate in legal proceedings, and to take certain steps when a plan has been rejected, their rights differ when it comes to contributing input to the business rescue plan, as well as voting on the plan, as set out in the next three sections.

The right to participate in court proceedings is a statutory right to intervene without having to apply for leave

(Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd [2021] 3 All SA 843 (SCA) 849–50).

27.4.1 Employees

During a company's business rescue proceedings, every registered trade union representing one or more employees of the company, and every employee who is not represented by a trade union, is entitled to

- receive notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings—this notice must be served at the head office of the appropriate trade union or given in the prescribed manner and form to employees at their workplace (as the case may be);
- participate in any court proceedings during the business rescue;
- be consulted by the practitioner on the business rescue plan and afforded sufficient opportunity to review the plan and prepare a submission (see below);
- be present at and make submissions to the meeting of holders of voting interests before a vote is taken on any proposed business rescue plan;
- vote with creditors, to the extent that the employee is a creditor, on a motion to approve a proposed business plan;
- propose the development of an alternative plan if a proposed business rescue plan is rejected; and
- present an offer in terms of s 153(1)(b)(ii) (see 27.6.7(iii)) to acquire the voting interests of anyone who opposes the adoption of a business rescue plan (s 144(1) and (3)).

Employees represented by a registered trade union exercise their rights as affected persons collectively through the trade union and according to applicable labour law (s 144(1)(a)). A registered trade union enjoys rights not extended to individual employees, such as the right to access the company's annual financial statements to enable it to apply for business rescue proceedings (s 31(3)). Employees not represented by a registered trade union exercise their rights either directly or by proxy through an employee's organization or representative (s 144(1)(b)). Trade unions and employees may form a committee of employees' representatives (s 144(3)(c)).

Section 144(2) provides that to the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by the company to an employee and was not paid before the beginning of the business rescue proceedings, the employee is a 'preferred unsecured creditor' of the company for the purposes of Chapter 6.

The business rescue plan must set out the types of claims according to insolvency law (s 150(2)(a)(ii); see 27.6.1). However, whereas insolvency law imposes certain limits on preferent claims of employees (see s 98A of the Insolvency Act; see 16.3.2(vi)), the full claims of employees must be afforded preference under the business rescue plan (*Commissioner, South African Revenue Service v Beginsel NO & others* 2013 (1) SA 307 (WCC) 316). The exact order of preference of pre-commencement claims will depend on the business rescue plan (s 150(2)(b)(v)); see 27.6.1).

A medical, pension or provident scheme for the benefit of a past or present employee of the company is regarded as an unsecured creditor of the company to the extent of any outstanding amount that was due and payable by the company to the trustees of the scheme at the time of the

commencement of business rescue (s 144(4)(a)). A defined benefit pension scheme also qualifies as an unsecured

creditor to the extent of the present value at the commencement of the business rescue proceedings of any unfunded liability under the scheme (s 144(4)(b)).

27.4.2 Creditors

Each creditor is entitled, or has the right, to

- receive notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
- participate in any court proceedings arising during business rescue proceedings;
- participate formally in the business rescue proceedings to the extent provided for in Chapter 6;
- participate informally in the business rescue proceedings by making proposals for a business rescue plan to the practitioner;
- vote in the prescribed manner to amend, approve or reject a proposed business rescue plan;
- propose the development of an alternative plan in the event of rejection of a proposed plan; and
- make an offer in terms of s 153(1)(b)(ii) (see 27.6.7(iii)) to acquire the voting interests of any persons who oppose the adoption of a business rescue plan (s 145(1)–(2)).

Voting interests are determined primarily by the value of the claims. Secured and unsecured creditors have voting interests equal to the value of the amount owed to them by the company (s 145(4)(a)). But a concurrent creditor who would be subordinated in a liquidation has a voting interest equal to the amount (if any) that he could reasonably

expect to receive in a liquidation (s 145(4)(b)). This amount must be determined by an independent expert valuation procured by the practitioner (s 145(5)(b)). The concurrent creditors 'who would be subordinated' are those who previously agreed to be subordinated or back-ranked in a liquidation (*Commissioner, South African Revenue Service v Beginzel NO & others* 2013 (1) SA 307 (WCC) 315–16).

The creditors are entitled to form a creditors' committee and be consulted by the practitioner through that committee while the business rescue plan is developed (s 145(3)). Only independent creditors—those that are not related to the company, its directors or the practitioner—may be members of this committee (s 128(1)(g)). The practitioner must determine whether a creditor is independent for these purposes (s 145(5)(a)). At least 15 business days before the meeting to consider the business rescue plan, the practitioner must inform each creditor whether he has been classified as independent or not and must inform subordinated creditors of the valuation placed on their claims (s 145(5)(c)). A creditor may approach the court for a review of the practitioner's decision (s 145(6)).

27.4.3 Securities holders

Although shareholders are 'affected persons', the concept does not expressly include holders of other company securities such as debenture holders. But all securities holders enjoy the same rights to participate in the proceedings. During a company's business rescue proceedings, each holder of any issued securities of the company is entitled to

- receive notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

- participate in any court proceedings that arise during the business rescue proceedings;
- participate formally in a company's business rescue proceedings to the extent provided for in Chapter 6;
- vote in the prescribed manner to approve or reject a proposed business rescue plan if it affects the rights associated with the class of securities that he (the holder of the company's shares and other securities) holds;
- propose in the manner contemplated in s 153 (see 27.6.7(i)) the development of an alternative to the business rescue plan if it is rejected; and
- make an offer in terms of s 153(1)(b)(ii) (see 27.6.7(iii)) to acquire the voting interests of any persons who oppose the adoption of a business rescue plan (s 146).

Holders of debt instruments (debentures) also qualify as creditors of a company. It is suggested that they can vote as creditors regarding the debts the company owes them. If the plan affects the rights attached to the debt instruments, including any special privileges such as voting rights, these holders of debt instruments may also vote as holders of securities (s 152(3)(c)).

27.5 Meetings and committees

27.5.1 First meeting of creditors

The practitioner must convene and preside over a first meeting of creditors within ten business days after being appointed (s 147(1)). At this meeting, the practitioner must inform the creditors whether he believes that there is a reasonable prospect of rescuing the company. He may receive proof of claims by creditors who may determine whether to form a creditors' committee and appoint its members (*ibid*). Decisions at the meeting are made by a

simple majority of the independent creditors' voting interests (s 147(3)).

27.5.2 First meeting of employees' representatives

The practitioner must also convene a first meeting of employees' representatives within ten days of his appointment (s 148(1)). The purpose of this meeting is to enable the practitioner to inform the employees whether he thinks that there is a reasonable prospect of rescuing the company and also to allow the employees to decide whether they wish to form an employees' committee (*ibid*). The practitioner must give notice of the meeting to every registered trade union representing one or more employees of the company and, if any employees are not represented by a registered trade union, to those employees or their representatives, setting out the date, time and place of the meeting, as well as the agenda for the meeting (s 148(2)).

27.5.3 Functions, duties and membership of committees

A committee of creditors, or of employees, may

- consult with the practitioner about any matter relating to the business rescue proceedings but may not direct or instruct the practitioner; and
- receive and consider reports relating to the business rescue proceedings on behalf of the general body of creditors or employees (s 149(1)(a)–(b)).

Page 358

The committee is obliged to act independently of the practitioner to ensure fair and unbiased representation of creditors' or employees' interests (s 149(1)(c)). To be a

member of a committee of creditors or employees, a person must be

- an independent creditor, or an employee, of the company;
- an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or
- authorized in writing to be a member by an independent creditor or employee (s 149(2)).

27.6 The business rescue plan

The business rescue plan is essential to business rescue proceedings because it sets out the practitioner's blueprint for rescuing the company. The plan must provide for the restructuring of the company's affairs, business, property, debt and equity and must maximize the likelihood of either the company's continuing in existence on a solvent basis or achieving a better return for the company's creditors and/or shareholders than would have been the case in an immediate liquidation (s 128(1)(b)(ii)). Although an application for business rescue must contain a factual basis to show that a plan meeting this requirement could be developed, a proposed plan cannot be required in a commencement application because it is the responsibility of the practitioner (*Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) 552–3). The practitioner must consult with creditors, other affected persons and the management of the company before preparing the plan (s 150(1)). Consultation involves more than merely informing affected persons and the company management (*Hlumisa Investment Holdings (RF) Ltd v Van der Merwe NO* 2015 JDR 2231 (GP) para 22, referring to *Scalabrini Centre & others v Minister of Home Affairs & others* 2013 (3) SA 531 (WCC) 553). Meaningful consultation entails that the

consulted party must be given sufficient information and time so that it can tender helpful advice, followed by the consulting party's taking sufficient time to consider that advice before reaching a decision (*Scalabrini Centre & others v Minister of Home Affairs & others (supra)* 553). An affected person's right to be consulted does not depend on whether he can vote at the meeting to consider the plan (*Hlumisa Investment Holdings (RF) Ltd & another v Van der Merwe NO & others (supra)* para 25).

27.6.1 Content of plan

The plan must consist of three parts. Part A must set out the background; Part B must set out the proposals; and Part C must provide an explanation of any assumptions and conditions (s 150(2)). The prescribed minimum content of each of these parts is listed in s 150(2) as follows:

The background in Part A must include at least

- a complete list of all the company's material assets, indicating those held as creditors' security when the business rescue proceedings began;
- a complete list of company creditors when the business rescue proceedings began, indicating which creditors would qualify as secured, statutory preferent and concurrent under insolvency law and which creditors have proved their claims;
- the probable dividend that creditors would receive in their specific classes if the company were to be placed in liquidation;

Page 359

- a complete list of the holders of the company's issued securities;
- a copy of the written agreement about the practitioner's remuneration; and

- a statement whether the plan includes a proposal made informally by a company creditor.

The proposals in Part B of the plan must include at least

- the nature and duration of any moratorium for which the plan makes provision;
- the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company or another company;
- the ongoing role of the company, and the treatment of any existing agreements;
- the company property that is to be available to pay creditors' claims under the plan;
- the order of preference in which the property proceeds will be applied to pay creditors if the plan is adopted;
- the benefits of adopting the plan as opposed to the benefits that creditors would receive if the company were to be placed in liquidation; and
- the effect that the plan will have on the holders of each class of the company's issued securities.

And the assumptions and conditions in Part C of the plan must include at least

- a statement of the conditions that must be satisfied, if any, for the plan to come into operation and be fully implemented;
- any effect that the plan contemplates on the number of employees and their terms of employment;
- the circumstances in which the plan will end; and
- a projected balance sheet for the company as well as a statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed plan is adopted.

The material assumptions on which the projections are based must be set out, and alternative projections based on varying assumptions may be included (s 150(3)). Yet a cash

flow projection is apparently not required. The practitioner must certify at the end of the plan that the actual information provided appears to be accurate, complete and up to date and that projections are good-faith estimations based on the facts and assumptions set out in the statement (s 150(4)).

Although s 150(2) provides that each part of the plan must contain 'at least' the listed content, it is obvious from the use of phrases such as 'the extent to which' and 'if any' in s 150(2) that not all of these elements will feature as a component of each plan. In *Commissioner, South African Revenue Service v Beginzel NO & others* 2013 (1) SA 307 (WCC) 317), Fourie J explained:

'A perusal of s 150(2) of the Act shows that the legislature has prescribed the content of a proposed business rescue plan in general terms. The content can, by its very nature, not be exactly and precisely circumscribed since it would differ from case to case, depending on the peculiar circumstances in which the distressed company finds itself. It follows, in my view, that upon a proper construction of s 150(2), substantial compliance with the requirements of the section will suffice. This would, in my view, mean that, where sufficient information, along the lines envisaged by s 150(2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected, there would have been substantial compliance.'

In addition to s 150(2), which sets out the prescribed content of a plan, s 154(1) provides

Page 360

that a business rescue plan *may* provide that a creditor who has acceded to a discharge of a debt due by the company will lose the right to enforce that debt if the plan is implemented according to its terms. The link between these two provisions, s 154(1) being the permissive one, was confirmed in *Van Zyl v Auto Commodities (Pty) Ltd* 2021 (5) SA 171 (SCA) 180–1.

We take a closer look at some elements of the plan:

- Details about the creditors, any security they hold, and their classification and likely dividend in liquidation, all forming part of the background, are relevant to determining whether business rescue will yield a better result than liquidation (the so-called 'liquidation comparator'). The requirement to include information about security held for claims has been relied on in interpreting s 134 on property rights (see 26.2). But the plan need not follow the statutory preferences of ss 96 to 102 of the Insolvency Act (*Commissioner, South African Revenue Service v Beginzel NO & others* (*supra*) 314). The only preferences provided for in Chapter 6 are those in respect of post-commencement financing, the ranking of which is comprehensively set out in s 135, and the pre-commencement claims of employees. The ranking and order of preference of all other claims depend on the proposals in part B of the plan (cf *Commissioner, South African Revenue Service v Beginzel NO & others* (*supra*) 318 discussing the claims in that case).
- The moratorium that may be provided for in a plan is different from the automatic general moratorium under s 133 (on which, see 26.1). This moratorium in the plan is not necessarily a stay of legal proceedings but might comprise a repayment holiday. It will also take effect only when the plan has been adopted and might extend beyond the termination of the business rescue proceedings.
- Although s 150(2)(b)(ii) requires the plan to set out the extent to which the company will be released from its debts, this provision must be read in conjunction with s 154(1), which sets out when a plan can provide for a discharge (see 27.6.4(i)).

27.6.2 Publication of plan

The plan must be published by the company within 25 business days after the practitioner's appointment unless the court (on application by the company) or holders of a majority of creditors' voting interests allow a longer time (s 150(5)). There are conflicting decisions on the way in which creditors must grant an extension. A vote at a properly convened meeting was held to be necessary in *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others* 2014 (1) SA 103 (KZP) 116, but in *Absa Bank v Golden Dividend 39 (Pty) Ltd & others* 2015 (5) SA 272 (GP) the court said it was sufficient that the creditor holding the majority of the voting interests consented (*idem* 281); see also *Blue Nightingale 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd* 2021 JDR 2747 (GJ) paras 73–4.

The immediate consequences of the failure to publish a plan are also uncertain. According to *DH Brothers Industries (Pty) Ltd v Gribnitz NO & another (supra)*, the business rescue proceedings are automatically terminated. But in *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC & others* [2015] ZAGPPHC 255 (11 March 2015) paras 22–8 the court came to the opposite conclusion, noting that there is no express provision for the lapsing of the proceedings in these circumstances.

27.6.3 Meeting to consider and vote on plan

The practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the proposed business rescue plan, within ten business days after the publication of the plan (s 151(1)). The phrase 'other holders of a voting interest' refers to holders of the company's securities who can vote only if their rights will be affected by the plan. The word 'creditor' in this context refers to all the pre-

commencement creditors because it is the details of their claims that must be set out in the business rescue plan (*National Union of Metalworkers of SA & others v VR Laser Services (Pty) Ltd & others* [2020] 2 All SA 536 (GJ) 545 550).

At least five business days before the meeting, the practitioner must deliver to all affected persons a notice of the meeting setting out the date, time and place of the meeting; the agenda of the meeting; and a summary of the rights of affected persons to participate in and vote at the meeting (s 151(2)).

At the meeting, the practitioner must do the following:

- introduce the plan for consideration and inform the meeting whether he continues to believe that there is a reasonable prospect of the company being rescued (s 152(1)(a)–(b));
- provide an opportunity for the employees' representatives to address the meeting (s 152(1)(c));
- invite discussion and hold a vote on any motions by creditors to amend the plan in any respect or to direct him (the practitioner) to adjourn the meeting so that he may revise the plan for further consideration at the adjourned meeting (s 152(1)(d)); and
- call for a vote for 'preliminary approval' of the plan (as amended, if applicable) unless the meeting has been adjourned to enable him to develop a revised plan (s 152(1)(e)).

The meeting may be adjourned from time to time until a vote is taken on whether to approve the plan (s 151(3)).

A plan receives preliminary approval for these purposes if it is supported by creditors holding more than 75 per cent of the creditors' voting rights, and the vote includes at least 50 per cent of independent creditors' interests, if any, that have voted (s 152(2)).

If the plan is not approved on a preliminary basis, it is rejected (s 152(3(a))). Approval on a preliminary basis also constitutes final approval (subject to compliance with any suspensive conditions) if the plan does not alter the rights of holders of any class of the company's securities (s 152(3)(b)). If the plan affects the rights of securities holders, the practitioner must immediately hold a meeting of the holders whose rights are affected. If the majority of those holders (the majority of the voting rights exercised) support the plan, it is taken to be finally adopted, subject to compliance with any suspensive conditions; if the majority oppose the plan, it is rejected (s 152(3)(c)).

27.6.4 Legal effect of plan

(i) General effect

Once approved, a business rescue plan is binding on the company and on all creditors and holders of the company's shares and other securities, whether or not they attended

Page 362

the meeting or voted for the plan (s 152(4)). A plan may provide that a creditor who has agreed to the discharge of the whole or part of a debt owing to him will lose the right to enforce that debt (s 154(1)).

An important question is whether a plan may reduce or compromise a creditor's claim without that creditor's consent. Section 154(1) requires that a creditor must 'accede' to the discharge or partial discharge of his claim. When he does this, the plan can provide for such a discharge, and the liability of the surety will also be discharged (*Van Zyl v Auto Commodities (Pty) Ltd* 2021 (5) SA 171 (SCA) 180–1; at 176 the court mentioned the uncertainty over the effect of an approved, implemented business rescue plan and cited *Locke* and *Van der Linde*

2018 TSAR 839 844–6). The word ‘accede’ implies a voluntary action of the creditor, consented to by an overt act such as the creditor’s voting for the plan that provides for the full or partial discharge of his claim. A creditor cannot be compulsorily deprived of his claim or a part of it (*Van Zyl v Auto Commodities (Pty) Ltd (supra)* 181).

If the plan is duly implemented, a creditor cannot enforce any debt owed to him by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan (s 154(2)). Section 154(2) prevents recourse against the company in respect of debts otherwise than as contemplated in the plan (*Van Zyl v Auto Commodities (Pty) Ltd (supra)* 182–3 188). The protection is personal to the company. The unenforceability against the company does not discharge the debt or claim (*idem* 182–3).

In *Eravin Construction CC v Bekker NO & others* 2016 (6) SA 589 (SCA), the court explained that even creditors who had not been informed of the business rescue proceedings would lose the right to enforce their pre-commencement claims (*idem* 594–5).

(ii) Effect on sureties

In contrast with the position in a s 155 compromise, where the liability of sureties for the company is preserved (s 155(9); see 28.3), the Act does not address the effect of an approved plan on the liability of sureties for the company. The uncertainty arising from this omission has twice prompted the Supreme Court of Appeal to pronounce on a plan’s effect on sureties in matters where it was not strictly necessary to do so because the suretyship agreements in question provided for continued liability despite any compromise of the principal obligation (see *Van Zyl v Auto Commodities (Pty) Ltd (supra)* 176–7; *New Port*

Finance Company (Pty) Ltd & another v Nedbank Ltd 2016 (5) SA 503 (SCA) 507).

The common law governs the situation: if the principal obligation is reduced through a compromise, the accessory liability of the surety is reduced to the same extent (*Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff & another* 2014 (4) SA 521 (WCC) 530–2). Adopting and implementing a plan does not extinguish the principal obligation, and so a surety will remain liable. The personal protection against enforcement of pre-commencement debts under s 154(2) protects only the company and does not affect the surety's liability. Only when the creditor has acceded to the discharge of the debt is the liability extinguished and so also the liability of the surety (*Van Zyl v Auto Commodities (Pty) Ltd (supra)* 180–1).

Another issue pertinent to sureties, although not related to the effect of the plan, is whether sureties are contingent creditors in the business rescue. The Supreme Court of Appeal has ruled that only once a surety or guarantor has paid the principal debt does the

Page 363

right of recourse against the company arise and then it can be included in a business rescue plan (*Zungu-Elgin Engineering (Pty) Ltd v Jeany Industrial Holdings (Pty) Ltd* 2020 JDR 2673 (SCA) paras 11–14).

27.6.5 Implementation of plan

Under the practitioner's direction, the company must take all necessary steps to satisfy any conditions attached to the approval of the plan and implement the plan as adopted (s 152(5)). To the extent necessary to implement the plan, the practitioner is empowered to issue authorized securities and determine the consideration for their issue, despite the

provisions of s 38 or s 40 to the contrary (s 152(6)(a)). If the plan was approved by shareholders, the practitioner may amend the company's Memorandum of Incorporation to authorize the issue, and to determine the preferences, rights, limitations and other terms, of further securities contemplated under the plan, despite the provisions in ss 16, 36 or 37 to the contrary (s 152(6)(b)). Unless the plan provides otherwise, shareholders' pre-emptive rights do not apply to shares issued in terms of the plan (s 152(7)).

Once the plan has been substantially implemented, the practitioner must file a notice to this effect, thus ending the business rescue proceedings (s 152(8) read with s 132(2)(c)(ii)).

27.6.6 Amendment of an adopted plan

The Act does not provide for amending an adopted plan. The court has no power to amend or vary the business rescue plan and cannot enforce its will on the affected persons (*Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* 2017 JDR 1577 (SCA)). Nor can the plan reserve a right for the practitioner to amend the plan after it has been adopted. A unilateral amendment would circumvent the procedure that gives the plan its binding force—the democratic majority vote of affected persons (*Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* 2017 (4) SA 51 (WCC) 76–7).

A court should have the power to set aside a plan that is shown not to have been properly adopted. In *Absa Bank Ltd v Naude NO & others* 2016 (6) SA 540 (SCA), the Supreme Court of Appeal was in principle prepared to consider such an application, but the application failed because the affected persons who voted for the plan had not been joined as parties.

27.6.7 Non-adoption of plan

If the plan is rejected, the practitioner may either obtain approval from the meeting for him to prepare and publish a revised plan, or apply to court to set aside the result of the vote on the grounds that it was inappropriate (s 153(1)(a)).

If the practitioner does not take either of the courses of action open to him, any affected person present at the meeting may do so (s 153(1)(b)(i)). In other words, the affected person may call for a vote from the holders of voting interests requiring the practitioner to prepare and publish a revised plan or else apply to court to set aside the result of the vote on the grounds that it was inappropriate.

As a third alternative, an affected person (or combination of such persons) may make an offer to acquire the voting interest of any person who opposed the adoption of the business rescue plan at a price to be determined by an independent expert (s 153(1)(b)(ii)).

Page 364

Before any of these alternatives come into play, the plan must have been put to the vote and rejected. In *South African Bank of Athens Ltd v Zennies Fresh Fruit CC* 2018 (3) SA 278 (WCC), a meeting to consider the plan was postponed, but it was unclear from the minutes whether the purpose was to prepare a revised plan. There was no record of a vote on the plan, and without being put to the vote, the plan could not have been rejected and the steps in s 153 could not have been triggered (*idem* 286).

While steps taken by an affected person under s 153 are pending, the practitioner must still apply for the liquidation of the company in terms of s 141(2)(a) if he concludes that there is no longer a reasonable prospect of rescuing the

company (*Naidoo v Michau NO* 2020 JDR 0008 (KZP) paras 50–3).

If none of the possible courses of action is taken in response to the rejection of the plan, the business rescue is terminated, and the practitioner must file a termination notice promptly (s 153(5)). The filing of the notice is a governance step and is not a precondition for the termination of the business rescue proceedings (*Rogal Holdings (Pty) Ltd & another v Victor Turnkey Projects (Pty) Ltd & others* 2022 JDR 1031 (GP) paras 41–3). The rejection of a business rescue plan is an independent and sufficient ground for the termination of the proceedings (s 132(2)(c)(i); see also *The Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd* 2021 JDR 1238 (KZP) paras 32–4).

(i) Revised plan

If, in a vote called by the practitioner or an affected person, the meeting directs the practitioner to prepare and publish a revised plan, the meeting must be concluded. The practitioner must prepare and publish the revised plan within ten business days, and the normal procedure for notification and the convening of a meeting to consider the plan must be followed (s 153(3)). The practitioner has no power to prepare and publish a revised plan of his own accord, ie, without a vote by affected parties (*Rogal Holdings (Pty) Ltd & another v Victor Turnkey Projects (Pty) Ltd & others* (*supra*) para 46).

(ii) Setting aside of vote as inappropriate

If the practitioner or an affected person decides to approach the court to have the vote declared inappropriate, the meeting must be adjourned for five days, unless the application is made to court within that time, or until the court has disposed of the application (s 153(2)). The

purpose of the resumed meeting is to inform affected persons whether an application was made and, if so, what its outcome was (*Ferrostaal GmbH & another v Transnet SOC Ltd & another* 2021 (5) SA 493 (SCA)). If the court has set aside the vote as inappropriate, the plan will have been 'adopted' by operation of law without the need for a further vote by creditors (*FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA) 61).

For the court to set aside the vote, it must be satisfied that it is reasonable and just to do so, having regard to

- the interests represented by the person or persons who voted against the plan;
- the provision made in the plan with respect to those interests; and
- a fair and reasonable estimate of the return to the person or persons if the company were to be liquidated (s 153(7)(a)–(c)).

It is appropriate for a creditor to vote in his own economic interest (*Naidoo v Michau NO (supra)* paras 41–4; *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC &*

others [2015] ZAGPPHC 255 (11 March 2015) para 38). In *Ferrostaal GmbH & another v Transnet SOC Ltd & another (supra)*, the company's largest and only independent creditor voted against the plan. This creditor was the landlord of the property being used by the company without paying rent. The plan lacked certainty on the payment of the monthly rental and the considerable arrears. The Supreme Court of Appeal held that the landlord's vote was appropriate because the plan did not fairly balance the rights and interests of all stakeholders as envisaged by s 7(k) (*idem* 503 506).

However, when the creditor has an ulterior motive, such as frustrating the company's damages claim against him, his vote may be set aside (*Collard v Jatara Connect (Pty) Ltd & others* 2018 (5) SA 238 (WCC) 247).

Whether the vote is inappropriate and whether it should be set aside involves a single enquiry and entails a value judgement (*FirstRand Bank Ltd v KJ Foods CC (supra)* 60). In addition to the factors set out in s 153(7), the court in the *KJ Foods* case considered other relevant circumstances as well as the purpose of business rescue proceedings (see O'Brien and Calitz 2021 TSAR 409 426 for criticism of this wide approach). In the *KJ Foods* case, the creditor who had voted to reject the plan would receive full payment over the original contract period, while payments to other creditors would be accelerated. The Supreme Court of Appeal ruled that this creditor's vote was inappropriate (*idem* 60–1).

(iii) Binding offer

The meaning of the concept 'binding offer' was settled by the Supreme Court of Appeal in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA). The court of first instance (*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2013 (6) SA 471 (GNP)) held that when an offer was made, a statutory set of rights and obligations automatically came into being that was binding on both parties. This interpretation was rejected on appeal, and the court explained that the offer is binding only on the person who has made it. The offeror cannot withdraw the offer, but the offeree can decide whether to accept or reject it (*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA) 210–11).

The price to be offered for the acquisition of the voting interest of persons who voted against the plan must

represent the likely return that the person concerned would receive upon the immediate liquidation of the company (s 153(1)(b)(ii)). When such an offer is made, the practitioner must adjourn the meeting for no more than five business days, to enable him to make any necessary revisions to the plan to reflect the results of the offer, and set a date for resumption of the meeting, without further notice, at which the same procedure for consideration of the offer (as outlined above) will apply afresh (s 153(4)).

Chapter 28

Compromise between a company and its creditors

Synopsis

- 28.1 Proposing a compromise with creditors
- 28.2 Approval and sanctioning
- 28.3 Compromise of tax debts

By contrast with a common-law or contractual composition, which depends on the agreement of all affected creditors (see 18.1), the statutory compromise provided under s 155 of the Companies Act allows a company or close corporation to achieve the same outcome with the consent of an enhanced majority of creditors. The non-consenting creditors are also bound, but their interests are safeguarded by the requirement that the court must sanction the compromise. The compromise mechanism of s 155 cannot be used when a simple agreement between the debtor and creditor would be possible: for example, when only one creditor is affected (*Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others* 2019 (6) SA 472 (GP) 487; *The Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd* 2017 JDR 1334 (GP) para 27). Because a compromise can contain any terms that could have otherwise been contained in a regular contract, it can be described as a quasi-contract in which a statutory mechanism replaces consensus. In this chapter, any reference to a company must be taken to include a close corporation. Close corporations being wound

up also have access to a composition under s 72 of the Close Corporations Act (see 24.8).

The Companies Act does not prescribe a threshold of insolvency or financial distress that qualifies a company to propose a compromise. For this reason, a compromise can be classified as a pre-insolvency procedure that enables the company to avoid the stigma of insolvency and liquidation. Later in the company's life cycle, though, a company may still propose a compromise even while in liquidation. One of the typical terms at that stage is that the liquidation order will be set aside.

A compromise is flexible. It can be directed at certain classes or categories of creditors and need not follow a prescribed ranking of claims. It may, for instance, be used to achieve a workout or financial restructuring with financial creditors such as banks and other financiers only, while leaving trade creditors unaffected. The range of its terms may include extending the period for repayment and even reducing or discharging claims (commonly known as a 'haircut' for affected creditors). Often a

Page 367

creditor with a particular interest in the survival of the debtor company will agree to fund the compromise by taking over the claims of other creditors at a reduced value. A compromise may include conditions: for example, that the compromise will take effect only if approved by all the classes of creditors or if similar compromises are adopted by creditors of other companies in the same group. The terms of the compromise also determine the procedure for fulfilling it. Typically, claims go to a 'receiver', who collects and administers the available funds and pays the affected creditors.

28.1 Proposing a compromise with creditors

A company that is not engaged in business rescue proceedings may enter into a compromise with its creditors (or a class of creditors). This procedure is available to a company regardless of whether it is in liquidation or is financially distressed (s 155(1)).

The board or the liquidator of the company (if it is being wound up) may propose an arrangement or compromise of the company's financial obligations (s 155(2)). The term 'arrangement' covers any adjustment of the terms of a financial obligation. By contrast, the term 'compromise' involves an element of give and take, such as reducing claims in exchange for the certainty of payment. A creditor whose rights are not affected cannot form part of a proposed compromise (*Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others* 2019 (6) SA 472 (GP) 484; *The Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd* 2017 JDR 1334 (GP) para 27).

A class of creditors is any group of creditors with similar rights and interests and whose rights will be similarly affected by the proposal (*Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others* (*supra*) 484–5). These creditors must be able to consult meaningfully together about their common interest. The insolvency classification into secured, preferent and concurrent creditors does not determine the composition of a class in a compromise. In *Logikal*, the company tried to escape liability for taxes by directing a proposal at all its creditors who would have a preference in insolvency: namely, the Commissioner of the South African Revenue Service (SARS) and the company's five employees. The company owed SARS more than R6.2 million in taxes and

claimed to owe each employee R5 476.00. Although the employees would be paid in full while SARS would receive only 20 per cent of its claim, the compromise treated them as one class of creditors. The court held that the division into classes is based on a commonality of interests. As the employees would rank higher than SARS in a liquidation, and as the compromise also proposed to affect these creditors differently, SARS and the employees could not be classified together for the purposes of the proposed compromise (*ibid*).

A proposal containing the minimum prescribed information must be sent to all the creditors (or all the creditors of the relevant class), along with a notice of the meeting at which it will be considered (s 155(2)(a)). A copy must also be filed with the Commission (s 155(2)(b)). The Companies Act allows three alternative methods of notification: email, fax or registered mail (s 6(10) read with Table CR3 of the Companies Regulations, 2011). In *Logikal*, the company sent a notice of the s 155 meeting by registered mail to SARS's Alberton office, which received the notice less

than 24 hours before the meeting. The company chose this notification method even though the company's advisers were informed that SARS has a dedicated email address for receiving notices relating to compromises. As the notice of the meeting had not reached the relevant SARS division in Pretoria in time, SARS was not represented at the meeting to consider the proposed compromise. The court held that the notification alternatives provide practical and cheap methods of notification that can be expected to reach the required destination in good time (*Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others (supra)* 483). SARS had chosen email notification to

suit its organizational structure. A purposive interpretation of the notification alternatives means that once a sender knows the intended recipient's preference, he must use the method chosen. As SARS was not properly notified, the meeting was not duly convened, and so a compromise could not be approved there (*idem* 483–4).

The proposal must contain all the information reasonably required to help creditors decide whether to accept or reject the proposal (s 155(3)). The proposal must consist of three parts: Part A, containing the background information; Part B, containing the proposals; and Part C, setting out any assumptions and conditions. A projected balance sheet showing significant assumptions and a statement of income and expenses for the following three years must be included (s 155(3)–(4)). An authorized director or officer must certify the accuracy, completeness and currency of factual information and declare that the projections and estimates were made in good faith and were based on factual information and assumptions set out in the statement by the director or officer (s 155(5)).

28.2 Approval and sanctioning

A compromise must be approved by a majority in number, representing 75 per cent or more in value of the creditors or class of creditors present and voting in person or by proxy at the meeting (s 155(6)). When a proposal is made to more than one class of creditors, each class must vote on and approve the proposal before it can bind that class (*The Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd* 2017 JDR 1334 (GP) paras 17–23). So creditors must vote in separate classes.

Having obtained the required approval, the company must apply to court for the sanctioning of the compromise (s 155(7)(a)). All creditors must be joined in the court

application (*The Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd* (*supra*) para 25) or at least be notified of it (*Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others* 2019 (6) SA 472 (GP) 479–80). The court's role is to protect particularly creditors who have voted against the compromise or who may have been unaware of it; the court needs to hear their views.

The court may sanction the compromise if it appears just and equitable (s 155(7)(b)). The court pays regard to the number of creditors represented and, in a company or corporation in winding-up, the report of the Master (s 155(7)(b)(i)–(ii)). Relevant information must be disclosed to the court. So, for example, the court in *Logikal* set aside the hastily obtained sanctioning order because of material non-disclosure. The court said that the sanctioning court should at the very least have been informed of SARS's stance that notice by registered mail was inappropriate and that SARS was unaware of the application for sanctioning the scheme. There were also some

unexplained changes to the company's financial position between its previous annual statements and the director's affidavit in support of the sanctioning application a few months later, suggesting that a shareholder loan might have been repaid. And the employees' claims, totalling less than R30 000, were suspect because they could easily have been settled from the almost R700 000 in cash that the company claimed to have on hand. All these aspects should have been considered in determining whether it was just and equitable to sanction the compromise (*Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others* (*supra*) 487).

A copy of the court order must be filed within five business days and must be attached to each copy of the company's Memorandum of Incorporation (s 155(8)(a)–(b)). Once sanctioned by the court, the compromise binds all the creditors or creditors of the relevant class from the date of its filing (s 155(8)(c)). The liability of a surety for the company or corporation is not affected by an arrangement or compromise (s 155(9)).

28.3 Compromise of tax debts

At common law, a tax authority may consent to the compromise of a tax debt only if that authority expects to receive at least as much under the compromise as it would recover from the taxpayer company in a final liquidation. This principle is supported by *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A); *Commissioner, South African Revenue Service v Logikal Consulting (Pty) Ltd & others* 2019 (6) SA 472 (GP) 485; and *The Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd* 2017 JDR 1334 (GP) para 27. There is also another limitation to consider. The Tax Administration Act 28 of 2011 provides that tax debts may not be compromised if this step will either prejudice other creditors or result in other creditors obtaining a position of advantage relative to SARS (s 203(d)). This provision also applies to compromises under s 155 of the Companies Act.

Tax debts can be compromised under Chapter 14 of the Tax Administration Act (regarding the write off or compromise of tax debts), but the procedure is designed to gain the maximum net return from recovering tax (s 200(a)). The compromise must be consistent with considerations of good management of the tax system as well as administrative efficiency (s 200(b)). If the company

is liquidated before it has met all the conditions of the compromise agreement, SARS is no longer bound by that agreement (s 205(d)).

s-border_insolvency/status> (accessed on 16 October 2022)).

At present, the South African law on cross-border insolvency law is controlled by

Page 375

common-law principles. The legislature did enact a South African version of the UNCITRAL Model Law. This statute, the Cross-Border Insolvency Act 42 of 2000, with a commencement date of 28 November 2003, can be applied only once the Minister of Justice has designated the foreign countries to which the Act will apply (see s 2(2)–(5)). The Act was passed in 2000; in 2022, the Minister's list is still awaited. This ministerial neglect has rendered the Act futile and a dead letter.

29.3 South African common law of cross-border insolvency

29.3.1 Foreign insolvency statutes not applicable; recognition of foreign insolvency representatives required

Foreign insolvency or bankruptcy statutes have no effect in South Africa (see *R v Etberg* 1932 AD 142 145; *Cooperativa Muratori & Cementisti & others v Companies and Intellectual Property Commission & others* 2021 (3) SA 393 (SCA) 401–2 (*Cooperativa*); cf *MT Pretty Scene: Galsworthy Ltd v Pretty Scene Shipping SA & another* 2021 (5) SA 134 (SCA) 165 (*Pretty Scene*)). Under the relevant law on cross-border insolvency, the appropriate representatives of foreign proceedings must seek recognition from the South African High Court (*Cooperativa (ibid)*; *Pretty Scene (ibid)*).

29.3.2 The divisions by property type and persons type

Whether the foreign representative, such as the trustee or liquidator, may deal with South African assets is a question decided according to a division of property types and the classification of persons. The first division, then, is between movable property and immovable property.

29.3.3 Movable property and natural persons

Movable property is governed by the law of the natural person's domicile (the *lex domicilii*). The debtor declared insolvent by the court of his domicile is thus, by a fiction, automatically divested of his movables throughout the world and, therefore, in South Africa (see, eg, *Viljoen v Venter NO* 1981 (2) SA 152 (W) 155). In theory, the foreign representative of the natural person debtor may deal with this automatically vested local movable property as he pleases.

It has long been accepted as a rule of practice, though, that the foreign representative is still prudent in seeking recognition from the South African courts before dealing with local assets (*Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 362; *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* 2016 (3) SA 143 (SCA) 155–6). It is submitted that this rule of practice has recently been elevated into a constitutional requirement binding upon all foreign representatives of the debtor. In *Cooperativa*, the application was brought by the Italian company, not the representatives of the Italian restructuring proceedings as it should have been ((*supra*) 402). Among other things, permission was sought to lead further evidence in the Supreme Court of Appeal about the progress of the composition process taking place in Italy. Wallis JA held (*idem* 400–1):

'The last, but by no means the least important, reason for not admitting this evidence is that, pursuant to it, CMC sought an order, the effect of which as explained in argument would be to impose upon South African creditors the terms of the composition approved by the Court of Ravenna, without their being cited or served or having had any opportunity to submit evidence or argument against an order having that effect. That would amount to a wholesale breach of their constitutionally guaranteed right of access to courts. It cannot be countenanced.'

It is submitted that, with the necessary changes, this ruling may be adapted to apply to the insolvency representative of a natural person and to the earlier stage of the matter at which the *Palmer* rule of practice requiring recognition applies. The steps that the representative wishes to take in South Africa affect the rights of the debtor's creditors in South Africa, including their constitutional right of access to courts (s 34 of the Constitution of the Republic of South Africa, 1996). Section 34 is based on the principle of the rule of law and prohibits self-help (Currie and De Waal *The Bill of Rights Handbook* 6 ed (2013) chapter 31, especially para 31.3(b), summarizing *Chief Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC)). This constitutional right exists independently of the foreign representative, does not distinguish between natural persons and juristic persons as debtors, and already protects the South African creditors at the time that the *Palmer* rule applies. Finally, the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled (s 2).

In court, the foreign representative would allege, among other things, that as he is the properly appointed foreign trustee of the debtor's insolvent estate, the debtor's movable property located in South Africa has already vested in him. So he expects to be recognized by the court as being authorized to deal with it accordingly. The crucial

point, though, is that he should still have to come to the High Court to seek the latter's recognition and further directions for notifying potential local creditors of the debtor. He should not be allowed to roam South Africa on his own initiative, trying to compel people to fall in with his efforts to collect and realize South African movable property. The overriding requirements of the Constitution now measure and control all law and conduct in South Africa, including his.

29.3.4 The debtor that is a juristic person

The representative of the proceedings involving a debtor that is a juristic person is always obliged to seek such recognition from the High Court (*Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA); *Lamonica v Baltic Reefers Management Ltd* 2011 (3) SA 164 (WCC) 167; *Cooperativa* (*supra*) 401–2). It must be the representative, not the company itself, that applies for this recognition (*Cooperativa* (*idem*) 402). He must show that he was appointed where the company is registered or has its principal place of business (*Lamonica v Baltic Reefers Management Ltd* (*supra*) 169) and that his claim is genuine. Whether it is valid is a decision, not for this court, but in proceedings he may bring after being recognized.

Page 377

29.3.5 Immovable property: recognition always required

Immovable property is governed by the law of the place where the immovable property is situated (the *lex situs*). This property remains vested in the debtor (*Lagoon Beach Hotel (Pty) Ltd v Lehane NO* 2016 (3) SA 143 (SCA) 156). An application for recognition by the foreign insolvency

representative to the High Court is therefore always required before he can deal with South African immovable property. In this regard, it makes no difference whether the debtor is a natural person or a juristic person (*Ex parte BZ Stegmann* 1902 TS 40 47–8; *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste intervening* 1990 (1) SA 954 (A) 960; *Lagoon Beach Hotel (Pty) Ltd v Lehane NO (supra)* 155–6).

29.3.6 The guiding principles, and the protection of local (South African) creditors

The South African courts apply comity, convenience and equity in exercising their discretion to recognize the foreign representative (*Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) 179; *Lamonica v Baltic Reefers Management Ltd* 2011 (3) SA 164 (WCC) 168). Comity is not applied, though, if it conflicts with public policy (*Society of Lloyd's v Romahn and two other cases* 2006 (4) SA 23 (C) 64).

A foreign court order of sequestration against a debtor does not prevent creditors in South Africa from bringing actions against the debtor in South African courts (*Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) 337–8).

South African creditors are also protected by conditions in the relevant court order providing for the realization of the assets and the payment of local creditors' claims before those assets or their proceeds may be removed to the foreign jurisdiction (*Cooperativa (supra)* 402). The appropriate order for a natural person debtor appears in *Ex parte Steyn* 1979 (2) SA 309 (O) 311–12, and the one for a juristic person debtor in *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste intervening* 1990 (1) SA 954 (A) 961–2 read with 957–8. Recognition of the foreign representative enables him to rely on domestic

South African law in carrying out his duties: see, eg, the provisions for holding commissions and interrogations under the Companies Act 61 of 1973 (the 1973 Act) in *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste intervening (supra)*).

29.3.7 Separate proceedings running at the same time in different countries, involving the same debtor

It is controversial whether an external company can be wound up in South Africa. On this debate, see chapter 23 introduction and 23.2.2(v) above. It must be emphasized that the present discussion here in 29.3.7 and 29.3.8 rests on the assumption that an external company *can* be wound up in South Africa, with the consequences indicated at the appropriate points in this discussion. In that event, an external company registered as such in South Africa may be wound up as though independent of its related foreign company, even if the latter continues; and the opposite also applies (*Sackstein NO v Proudfoot SA (Pty) Ltd* 2003 (4) SA 348 (SCA) 357). The company may thus be subject to simultaneous, concurrent winding-up processes. The discontinuation of foreign winding-up proceedings cannot, in itself, affect the South African process. And the

Page 378

respective liquidators can deal independently with the assets and liabilities of the company in the various countries. However, the Supreme Court of Appeal in *Proudfoot's* case did not explore the implications of the concurrence of separate proceedings regarding a single entity, Olivier JA holding (*idem* 357) that

'the registration in the Republic of South Africa of an external company does not result in there being two separate legal *personae*, registered respectively in two countries. . . . There is only one legal *persona*,

registered in two countries. . . . The consequence of this situation can obviously lead to seemingly irreconcilable conflicts of authority and powers between two simultaneous and concurrent liquidators, and hence to difficult legal and commercial problems. In cases of dual registration, a principle of demarcation in the event of a dispute between the liquidators will have to be developed.'

It follows that an external company retains its separate legal personality (*persona*) even after being deregistered in South Africa (*Manitoba Investment Holdings Ltd v Lipchin & others* 2010 (2) SA 612 (GNP) 620).

The South African liquidator may act under s 391 of the 1973 Companies Act (read with Sch 5, item 9 of the Companies Act 71 of 2008 (the 2008 Companies Act) on transitional arrangements (see 1.3.2; 23 introduction) to impeach voidable transactions in South Africa, no matter where the relevant property is situated. If that property is situated outside South Africa, the liquidator must then seek the recognition of the South African court order in the appropriate foreign country. The liquidator may thus choose whether to act under s 391 of the 1973 Companies Act or to seek foreign recognition of his appointment so that he may undertake impeachment and recovery processes outside South Africa (*Sackstein NO v Proudfoot SA (Pty) Ltd (supra)* 359–60).

The court *a quo*, applying the principle that the company in these circumstances remains a single entity, still held that 'the separate winding-up proceedings in two different countries can only relate to separate, non-identical estates of that company, each having its own assets and liabilities' (*Sackstein NO v Proudfoot SA (Pty) Ltd* [2005] JOL 14088 (W) para 21). The status of a company in private international law is determined by the law of its country of incorporation (*idem* paras 16–19). Section 340 of the 1973 Companies Act governs companies unable to pay their debts at the institution of the impeachment proceedings. In *Proudfoot's* case, the parent company in the Namibian

winding-up, which was later rescued in the Namibian compromise, was no longer a company unable to pay its debts in Namibia. That compromise bound all creditors of the Namibian estate of the company. The South African external company remained in winding-up. Its liquidator brought an action to impeach as voidable dispositions certain payments received in South Africa by a South African creditor of the parent company. The action failed (*idem* paras 23–30).

In a further appeal in the South African liquidator's impeachment action, the Supreme Court of Appeal decided the matter not on the basis of cross-border insolvency law but rather on the basis of the interpretation of s 340(1) of the 1973 Companies Act, read together with ss 29(1) and 30 of the Insolvency Act (see *Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 (6) SA 358 (SCA) 360–1). It was held that this action 'was instituted after the compromise was sanctioned and the compromise had a considerable impact on the solvency of the company' (*idem* 361). The liquidator had not proved that the debtor company was unable to pay its debts at

the institution of his action. The order by the court *a quo* was therefore amended to one of absolution from the instance. (Such an order dismisses the claim because insufficient evidence was led to support it.)

It is suggested that a principle of demarcation is needed when a dispute between the respective liquidators of a company incorporated in one state and registered as an external company in another state must be settled on the basis of cross-border insolvency. Such a principle should acknowledge that the company, though remaining a single person, has separate estates in separate states.

29.3.8 The effect of foreign sequestration and discharge upon the contracting parties' contract

In the conflict of laws, the general rule is that the law governing the substance of the contracting parties' contract is determined by the 'proper law' of the contract (see Smith and Borraine (2021) 54(3) *CILSA* 1). This is the law the parties choose, expressly or implicitly (*Standard Bank of SA Ltd v Efroiken & Newman* 1924 AD 171; *Ex parte Spinazze & another NNO* 1985 (3) SA 650 (A)). The 'proper law' also determines the validity of the discharge of the contract. One of the ways in which a contract may be discharged is by sequestration.

Two rules determine the effect of later sequestration and discharge on the contract:

- The primary rule is that the discharge of a contractual debt under the insolvency law of the country whose law governs the contract is a valid discharge in South African law (*In re Percy Hope* (1885–1888) 2 SAR TS 25). The proviso is that the discharge must extinguish the contractual debt and not merely interfere with the remedies or course of procedure to enforce the debt (*African Banking Corporation v Owen* (1897) 4 Off Rep 253). So if, for example, the proper law of the contract is English law, the discharge of the contract by a bankruptcy order of the English court is recognized in the South African conflict of laws.
- The secondary rule is that the discharge of a contractual debt by the law of a country other than the country in which the debt arises does not relieve the debtor in any other country (*Ferguson v Stanton* (1884) 3 HCG 289). The facts of a leading case in this field serve as an example. The parties concluded a contract under English law. Later the French debtor went into liquidation in France: the process was governed by French law and these contracting parties'

debt was discharged. The English creditor then sued the debtor in England for the debt and won. The English courts rejected the debtor's reliance on the French discharge of the English debt as a defence. See *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399—giving rise to what is called the *Gibbs* rule.

In brief: if the bankruptcy discharge is granted by the court of the country whose laws govern the contract, the discharge is recognized (the primary rule (*Hope (supra)*)), but otherwise not (the secondary rule (*Gibbs/Ferguson*)).

The position on the effect of *pre-insolvency*/winding-up proceedings upon the contract is unclear in the South African conflict of laws. These proceedings would include corporate rescue in various forms and a compromise with creditors under the common law. These foreign proceedings, for example, would include the reorganization of the company under Chapter 11 of the United States Bankruptcy

Code and administration for companies under Sch B1 to the Insolvency Act 1986 (c. 45) in the United Kingdom. It must be remembered that we are *not* talking about South African forms of rescuing companies here, because external companies do not qualify for business rescue or a compromise with their creditors in Chapter 6 of the Companies Act 71 of 2008 (see s 1 definition of 'company'; *Cooperativa (supra)* 394–7). To be clear: these proceedings take place *before* sequestration or winding-up. Logically, then, the rule that applies is the general rule governing the contract. The position is thus decided by the 'proper law' of the contract (*Standard Bank of SA Ltd v Efroiken & Newman (supra)*). The rules in this area of the South African conflict

of laws have been derived from English law. Conceivably, English law would be consulted again as a source of inspiration for dealing with this pre-sequestration/winding-up situation. The *Gibbs* rule was applied in *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia & others* [2018] EWCA Civ 2802 (18 December 2018), [2019] 2 All ER 713. The *OJSC* case involved contracts concluded under English law. The *OJSC International Bank of Azerbaijan* had later been restructured under Azeri law in Azerbaijan. The Court of Appeal in England decided that the restructuring plan did not apply to the debts incurred under English law. So, if English law in the *OJSC* case were followed in South Africa using the relevant rules on contract and company law, the *Gibbs/Ferguson* rule would be applied to this situation too. This would mean that if the company's restructuring, for example, had taken place according to the same law as the proper law of the contract, the variation or discharge of the contractual provisions would be recognized as valid in South African law (under the primary rule (*Hope*)), but otherwise not (under the secondary rule (*Gibbs/Ferguson*)).

The application of the *Gibbs* rule to this situation, however, is controversial. It has been argued that the position should be controlled by insolvency law, not contract law. The interests of the *concursum creditorum* should therefore prevail over the interests of a creditor who relies on the *Gibbs* rule to exclude himself from the *concursum creditorum*, thus freeing himself to recover the debt from the debtor by individual debt-collection processes (see 1.2). We may call this alternative approach the 'no-*Gibbs* approach' for the sake of brevity. One problem with this approach is that, by definition, there is no sequestration or winding-up order in place, and so no *concursum creditorum* either (see 1.2; *Walker v Syfret* NO 1911 AD 141 166). And if the rescue mission succeeds, there may never be a

sequestration or winding-up order. It is unclear how insolvency law may justifiably be applied without a *concursum creditorum*. The no-*Gibbs* approach may therefore be criticized as an overreach applying insolvency rules out of context.

The position on pre-insolvency/winding-up proceedings is thus open for decision by a senior court in South Africa. Both approaches (ie, *Gibbs* or no-*Gibbs*) to the issue would be considered and a decision given on which should apply in South African common law today. The need is urgent because, as already indicated, an external company is excluded from the definition of a 'company' in s 1 of the 2008 Companies Act and does not qualify for business rescue and a compromise with creditors in Chapter 6 of that Act (*Cooperativa (supra)* 394–7). This means that if the representative of the foreign corporate rescue proceedings is not recognized in

Page 381

South Africa, the local branch of the company (the external company) cannot be saved by business rescue or a compromise with creditors under the 2008 Companies Act.

It is also conceivable, though, that the South African court may decide that its role is to declare the law and not to make it, and that the problem must be dealt with by legislation. An important consideration is that this problem concerns a question of substantive law. For reasons of its own, the legislature has decided against extending business rescue and a statutory compromise with creditors to external companies. It is also uncertain when this reform would be attended to by the legislature.

How else could the problem be addressed in the meantime? A common-law compromise with creditors is possible in theory, but hard to achieve in practice. South

African creditors whose contracts with the external company are controlled by South African law will rely on the *Gibbs/Ferguson* rule if faced with pre-insolvency/winding-up proceedings governed by foreign (ie, non-South African) law. These creditors will say that they signed up for the combination of the *Hope* and the *Gibbs/Ferguson* rules when they concluded their contracts under South African law with the external company. They cannot be compelled to accept a non-*Gibbs* outcome that a majority of the creditors, anywhere, seeks to impose on them. This is because a common-law compromise requires acceptance by *all* the creditors (see 18.1), including these South African hold-out creditors relying on the *Gibbs/Ferguson* rule in this situation. If these creditors cannot be settled with on terms *that suit them*, the external company will then slide into winding-up (assuming this is legally possible for this external company; cf 23.6.7), or else its assets will be attached and sold in execution by individual judgment creditors in the ordinary debt-collection process (see 1.2).

29.3.9 The effect of a South African rehabilitation on foreign debts

The question may be asked whether the debtor's rehabilitation in South African law affects his foreign debts. The answer is that it does. It discharges his foreign debts too (*North American Bank Ltd (in Liquidation) v Granit* 1998 (3) SA 557 (W); see 19.3).

29.3.10 The South African insolvency representative visits another country to find and realize property there for returning the proceeds to South Africa

A South African representative such as a trustee or liquidator may be keen to pursue investigation and recovery

processes outside South Africa. To do this, he may have to apply to the South African High Court for 'letters of request'. These documents recognize his appointment as a preparatory step for approaching the relevant foreign authorities. In seeking these 'letters of request', the representative need only hold the genuine belief that foreign proceedings should be initiated. He is not required to establish a *prima facie* case or prove a reasonable prospect of success in uncovering assets through foreign examination, in order to convince the South African court to grant him 'letters of request' (*Gardener & another v Walters & another NNO (In re Ex parte Walters & another NNO)* 2002 (5) SA 796 (C) 810–11; *contra Ex parte Wessels & Venter NNO: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O) 681). It does not matter whether the representative, in taking this decision that is his alone to take, relies

on impeccable information or mere hearsay (*Gardener & another v Walters & another NNO (In re Ex parte Walters & another NNO)* (*supra*) 810–11).

Equipped with the 'letters of request' from the South African High Court, the representative then approaches the relevant authorities in the foreign country he wishes to work in to find and realize the debtor's assets. The representative is required to follow the relevant rules in that foreign country. He may well have to apply to a senior court there for recognition. That court's order would then authorize him to enlist the help of persons such as civil servants responsible for registering immovable property, for example, or private banks reluctant to breach their obligations to their clients without an explicit order from the appropriate local court. The help of such institutions will be crucial to the success of the representative's mission. With

their help, he may be able to find property belonging to the debtor, realize it, and bring its proceeds back to South Africa to swell the free residue available for distribution among the creditors who have proved claims in the local insolvency or liquidation process.

29.3.11 Conclusion to the common law and introduction to the Cross-Border Insolvency Act: different language and distinctions

The discussion now moves on to deal with the Cross-Border Insolvency Act. It is important to note that the divisions in the South African common law of cross-border insolvency—between movable property (29.3.3) and immovable property (29.3.5) as well as between natural person debtors (29.3.3) and juristic person debtors (29.3.4)—do not apply in terms of the Cross-Border Insolvency Act. Equally, this Act has language and distinctions that do not feature in the South African common law of cross-border insolvency law. In this respect, for instance, a crucial distinction to look out for is the one between foreign main proceedings and foreign non-main proceedings (see 29.4.5).

29.4 Cross-Border Insolvency Act

29.4.1 The preamble to the Act: its application and objectives

The Cross-Border Insolvency Act includes chapters on interpretation and fundamental principles; access of foreign representatives and creditors to South African courts; recognition of foreign proceedings and relief; co-operation with foreign courts and foreign representatives; and concurrent proceedings. The Act aims at co-operation between South African courts and foreign courts in cross-border insolvency matters; improved legal certainty for